

San Francisco Law Library

No. 77044

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

1314

United States 1314

Circuit Court of Appeals

For the Ninth Circuit.

FIRST NATIONAL BANK OF PARK RAPIDS,
a Corporation,

Plaintiff in Error,

vs.

R. F. PRAY,

Defendant in Error.


Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED

APR 21 1922

F. D. MONCKTON,
CLERK



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

United States
Circuit Court of Appeals
For the Ninth Circuit.

FIRST NATIONAL BANK OF PARK RAPIDS,
a Corporation,

Plaintiff in Error,

vs.

R. F. PRAY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer to Third Amended Complaint.	8
Assignments of Error.	45
Bill of Exceptions.	18
Bond on Writ of Error.	67
Certificate of Clerk U. S. District Court to Transcript of Record.	70
Citation on Writ of Error.	73
Judgment of Nonsuit.	17
Minutes of Court—January 20, 1922—Order Granting Motion for a Judgment of Non- suit, etc.	16
Names and Addresses of Attorneys of Record.	1
Order Granting Motion for a Judgment of Nonsuit, etc.	16
Order Settling Bill of Exceptions.	43
Petition for Writ of Error and Order Direct- ing Writ to Issue.	44
Praeipie for Record on Writ of Error.	68
Return to Writ of Error.	72
Stipulation Approving Bill of Exceptions.	42
Stipulation Waiving Jury.	15

Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TIFF:	
TABER, W. M.	19
Third Amended Complaint on Promissory Note Against Guarantor.	1
Writ of Error.	70

Names and Addresses of Attorneys of Record.

WILLARD P. SMITH, Esq., Claus Spreckels Building,
San Francisco, Calif.,
Attorney for Plaintiff.

ALBERT A. ROSENSHINE, Esq., and Messrs.
GOLDMAN, NYE & SURR, Mills Building,
San Francisco, Calif.,
Attorneys for Defendant.

In the District Court of the United States in and
for the Southern Division of the Northern District
of California, Second Division.

No. 16,519.

THE FIRST NATIONAL BANK OF PARK
RAPIDS,

Plaintiff,

vs.

R. F. PRAY,

Defendant.

**Third Amended Complaint on Promissory Note
Against Guarantor.**

Now comes the plaintiff and for its third amended
complaint herein alleges:

I.

That plaintiff is now, and at all the times herein
mentioned was, a banking corporation organized
under the laws of the United States and carrying on

2 *First National Bank of Park Rapids*

a banking business at Park Rapids, in the State of Minnesota.

II.

That plaintiff is a citizen of the State of Minnesota.

III.

That defendant is a citizen of the State of California and a resident of the northern district of California.

IV.

That more than three thousand dollars (\$3,000), exclusive of interest and costs, are involved in the controversy herein.

V.

That at Park Rapids, in the State of Minnesota, on or about the 22d day of March, 1915, the White Stores Company [1*] made, executed and delivered to plaintiff its promissory note in writing, a copy of which reads as follows:

“Park Rapids, Minn., March 22d, 1915.

March 22d, 1916, after date, (without grace) for value received, I promise to pay to the order of THE FIRST NATIONAL BANK OF PARK RAPIDS \$4,500.00 Four Thousand Five Hundred dollars with interest at the rate of 8 per cent per annum, payable annually from date until paid. Payable at The First National Bank, Park Rapids, Minn.

All the signers and endorsers hereby severally

*Page-number appearing at foot of page of original certified Transcript of Record.

waive demand, notice of non-payment, and protest.

THE WHITE STORES COMPANY.

By J. SHERE,

Pres.

By R. F. PRAY.

Secretary."

(Endorsed on the back as follows:)

"For value received I guarantee the payment of the within note at maturity or any time thereafter waiving demand, protest and notice of protest.

J. SHERE.

R. F. PRAY."

"Endorsement on principal: Balance due on
Principal. 5/7 18 993.21 3506.79."

VI.

That on or about March 22, 1915, and prior to the delivery of the same, the defendant, in writing, for value received, guaranteed the payment of said note at maturity and waived demand, protest and notice of protest of same.

VII.

That the said White Stores Company became insolvent prior to 1918 and that its property was placed in the hands of trustees in insolvency and defendant during the years 1916, 1918 and 1919 requested plaintiff not to press the payment of said note, and assured plaintiff that dividends would be received from the said trustees of said White Stores Company to apply on said note during the years above mentioned; and defendant

further assured plaintiff that an extension would enable defendant to secure from other sources money to apply on the said note; and plaintiff in compliance with said requests and assurances did not [2] press the payment of said note during said years of 1916, 1918 and 1919; and plaintiff at the request of defendant extended the maturity of said note and said maturity was extended to September 19, 1919, and relying upon said requests of defendant to extend the maturity of said note and to refrain from instituting suit on the same, plaintiff extended the maturity of same until September 19, 1919.

VIII.

That no part of said note has been paid, except the sum of \$993.21, which was paid thereon May 15, 1918.

And for a second cause of action against said defendant, plaintiff alleges:

I.

That plaintiff is now, and at all the times herein mentioned was a banking corporation organized under the laws of the United States and carrying on a banking business at Park Rapids, in the State of Minnesota.

II.

That plaintiff is a citizen of the State of Minnesota.

III.

That defendant is a citizen of the State of California and a resident of the northern district of California.

IV.

That more than three thousand dollars (\$3,000), exclusive of interest and costs, are involved in the controversy herein.

V.

That at Park Rapids, in the State of Minnesota, on [3] or about the 22d day of March, 1915, the White Stores Company made, executed and delivered to plaintiff its promissory note in writing, a copy of which reads as follows:

“Park Rapids, Minn., March 22d, 1915.

March 22d, 1916, after date, (without grace) for value received, I promise to pay to the order of THE FIRST NATIONAL BANK OF PARK RAPIDS \$4,500.00 Four Thousand Five Hundred Dollars with interest at the rate of 8 per cent per annum, payable annually from date until paid. Payable at the First National Bank, Park Rapids, Minn.

All the signers and endorsers hereby severally waive demand, notice of non-payment, and protest.

THE WHITE STORES COMPANY.

By J. SHERE,

Pres.

By R. F. PRAY,

Secretary.”

(Endorsed on the back as follows:)

“For value received I guarantee the payment of the within note at maturity or any

time thereafter waiving demand, protest and notice of protest.

J. SHERE.

R. F. PRAY."

"Endorsement on principal: Balance due on Principal 5/7 18 993.21 3506.79."

VI.

That on or about March 22, 1915, and prior to the delivery of the same, the defendant, in writing, for value received, guaranteed the payment of said note at maturity and waived demand, protest and notice of protest of same.

VII.

That no part of said note has been paid, except the sum of \$993.21, which was paid thereon May 15, 1918.

VIII.

That within four years next preceding the beginning of this action the defendant in writing acknowledged the said indebtedness and promised to pay the same.

WHEREFORE plaintiff demands judgment against the defendant in the sum of Four Thousand Five Hundred Dollars (\$4500), with interest from March 22, 1915, at eight per cent per annum, less said sum of \$993.21 to be applied upon the interest and costs.

WILLARD P. SMITH,

MARK WOOLEY,

Attorneys for Plaintiff. [4]

United States of America,
State of California,
City and County of San Francisco,—ss.

Willard P. Smith, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff above named; that he has read the foregoing third amended complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters that he believes it to be true.

The reason why this verification is not made by plaintiff is that plaintiff is a corporation organized under the laws of the United States and doing business in the State of Minnesota and none of its officers reside or are within the State of California or in the City and County of San Francisco where affiant has his office.

WILLARD P. SMITH.

Subscribed and sworn to before me this 28th day of November, 1921.

[Seal]

E. J. CASEY.

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within third amended complaint is hereby admitted this 28th day of November, 1921.

ALBERT A. ROSENSHINE.

Atty. for Deft.

[Endorsed]: Filed Nov. 28, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16,519.

THE FIRST NATIONAL BANK OF PARK
RAPIDS,

Plaintiff,

vs.

R. F. PRAY,

Defendant.

Answer to Third Amended Complaint.

Now comes defendant answering to the third
amended complaint of plaintiff herein, and for
answer thereto admits, denies and alleges as fol-
lows:

FIRST DEFENSE TO FIRST CAUSE OF
ACTION.

I.

Defendant denies that during the years 1916,
1918 and 1919, or either of these or any year or at
all, defendant requested plaintiff not to press the
payment of said note. In that connection defend-
ant avers that he was always anxious to have plain-
tiff press the payment of said note, though de-
fendant was not greatly desirous to have plaintiff
press the payment of the guaranty by this defend-

ant. That defendant never held out any inducement or request, however, to plaintiff not to press defendant herein upon said guaranty, or did anything whatsoever to cause plaintiff to refrain in any manner or for any time or at all from proceeding against defendant and defendant's guaranty.

Defendant denies that he ever assured plaintiff that dividends would be received from the trustees of White Stores Company in the years mentioned, or ever or at all. [6] Defendant, however, avers that dividends have accrued in the hands of said trustees of said White Stores Company, to apply and applicable on said note, in amounts at this time unknown to defendant but known to plaintiff, and which amounts either have been already paid to plaintiff or await plaintiff's acceptance in reduction or extinction of said note.

Defendant is informed and believes and therefore avers that said accumulations suffice to pay said note, and if not already distributed to plaintiff, are now ready for such distribution, and available to plaintiff.

Denies that defendant ever assured plaintiff that an extension would enable defendant to secure money from other sources to apply on said note or at all. Defendant avers that never at any time or place was plaintiff influenced in any manner or at all as to the time of bringing this or any action by any word or deed of defendant, written, spoken, or however manifested.

Denies that any delay of plaintiff in failing to

press or in bringing said action was in compliance with requests and assurances, or either of these, from defendant, or from any person at all.

Denies that plaintiff ever extended the maturity of said note, at any time or at all, or to any time or at all. Denies that plaintiff ever extended the time for payment of said guaranty. Avers that if plaintiff ever extended the time for payment of said note, such extension was never made known to defendant, and such extension released defendant as guarantor from his guaranty on said note.

Denies that defendant ever made any request to extend the maturity of said note and/or to refrain from [7] instituting suit thereon.

II.

Defendant has no information on which to form a belief, and basing his denial on that ground denies that no part of said note except the sum of \$993.21 has been paid.

Defendant is informed and believes and therefore alleges that all of said note has been paid, and also that there exist available to plaintiff funds of the principal debtor applicable to and sufficient for the extinction of said note and all thereof.

SECOND DEFENSE TO FIRST CAUSE OF ACTION.

And for a further, second and separate defense to said first cause of action in said third amended complaint, defendant avers:

III.

That said purported cause of action is barred

by the Statutes of Limitation of the State of California, and by the provisions of Section 337 and 339 of the Code of Civil Procedure of the State of California. Defendant avers that said statutes and each and all of them have run against said note and against said guaranty, and that more than two years, and that more than four years, have passed since the maturity of said note, and since the maturity of said guaranty.

IV.

That said sum of \$993.21 was paid on or about May 7th, 1918, and was not paid by this defendant, or at his request, or with his knowledge, or with his funds. Defendant is informed and believes, and therefore avers, that same was paid by [8] the principal debtor upon said note, and in nowise availed to extend the time allowed by law to sue or at all to toll the Statute of Limitations as to the guaranty or as to this defendant. That defendant has done nothing to preclude or delay the operation of said Statute of Limitations, and expressly relies on same.

THIRD DEFENSE TO FIRST CAUSE OF ACTION.

And for a further, third and separate defense to the first cause of action in said third amended complaint, defendant avers:

V.

That it does not set forth facts sufficient to constitute a cause of action, in that while it avers that said note has not been paid, it nowhere avers that said guaranty has not been paid. That said

guaranty is an obligation distinct from said note, and so held in 164 Cal. 332 and other cases.

FIRST DEFENSE TO SECOND CAUSE OF ACTION.

For a first defense to the second cause of action set forth in said third amended complaint, defendant admits, denies and alleges as follows:

I.

Defendant has no information on which to form a belief, and basing his denial upon that ground, denies that no part of said note except the sum of \$993.21 has been paid.

Defendant is informed and believes, and therefore alleges, that all of said note has been paid, and also that there exists funds of the principal debtor applicable to and sufficient for the extinction of said note, and all thereof. [9]

II.

Denies that within four (4) years next preceding the commencement of this action, or at any time or at all, the defendant in writing or otherwise acknowledged said indebtedness or any indebtedness, and denies that within said time or ever, he promised to pay same or any thereof.

SECOND DEFENSE TO SECOND CAUSE OF ACTION.

(Statute of Limitations.)

And for a further, second and separate defense to said second cause of action, defendant avers that:

III.

Said purported cause of action is barred by the

Statutes of Limitation of the State of California, and by the provisions of Section 337 and 339 of the Code of Civil Procedure. Defendant avers that said statutes have run against said note and against said guaranty, and that defendant has never since the running of said statutes promised to pay said indebtedness, or acknowledged said indebtedness.

THIRD DEFENSE TO SECOND CAUSE OF ACTION.

And for a further, third and separate defense to the second cause of action set forth in said third amended complaint, defendant avers that:

IV.

It does not set forth facts sufficient to constitute a cause of action. That it appears to recognize that the Statute of Limitations has run against the original guaranty, and apparently attempts to rely upon a new promise as the basis of action, and that said new promise is not set up and is not [10] pleaded, and the reference thereto is a mere conclusion of the pleader and insufficient for any purpose.

WHEREFORE, defendant prays that plaintiff take nothing by its third amended complaint herein, and that defendant be hence dismissed with his costs.

ALBERT A. ROSENSHINE and
GOLDMAN, NYE & SURR.

State of California,

City and County of San Francisco,—ss.

Albert A. Rosenshine, being first duly sworn, deposes and says: That he is one of the attorneys for defendant above named; that he has read the foregoing answer to the third amended complaint of plaintiff, and that same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is not made by defendant is that defendant has his office and residence and actually in the County of Tehama, and the office and residence of affiant are both in the City and County of San Francisco.

ALBERT A. ROSENSHINE.

Subscribed and sworn to before me this 23d day of December, 1921.

[Seal]

EUGENE W. LEVY,

Notary Public in and for the City and County of
San Francisco, State of California. [11]

Due service and receipt of copy of within answer admitted this 23d day of December, 1921.

WILLARD P. SMITH,

Attorney for Plaintiff.

[Endorsed]: Filed Dec. 23, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[12]

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, Second Division.

No. 16,519.

THE FIRST NATIONAL BANK OF PARK
RAPIDS,

Plaintiff,

vs.

R. F. PRAY,

Defendant.

(Stipulation Waiving Jury.)

A jury is hereby waived.

Dated: San Francisco, December 21, 1921.

WILLARD P. SMITH,

Attorney for Plaintiff.

ALBERT A. ROSENSHINE,

VINCENT SURR,

Attorneys for Defendant.

So ordered:

FRANK H. RUDKIN,

Judge.

[Endorsed]: Filed Dec. 22, 1921. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[13]

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

Minutes of Court—January 20, 1922—Order Granting Motion for a Judgment of Nonsuit, etc.

Defendant moved the Court for a judgment of nonsuit and after arguments by counsel the said motion was submitted and being fully considered, it was ordered that said motion be granted and that a judgment of nonsuit be entered herein accordingly, with costs to the defendant. [14]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,519.

THE FIRST NATIONAL BANK OF PARK
RAPIDS,

Plaintiff,

vs.

R. F. PRAY,

Defendant.

Judgment of Nonsuit.

This cause having come on regularly for trial on the 20th day of January, 1922, before the Court sitting without a jury, a trial by jury having been waived by written stipulation filed; Willard P. Smith, Esq., appearing as attorney for plaintiff and Albert A. Rosenshine and Vincent Surr, Esqrs., appearing as attorneys for the defendant; and the trial having been proceeded with and evidence having been introduced on behalf of plaintiff, and the attorney for the defendant having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit and the Court, after due consideration, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and the same is hereby entered against said plaintiff herein; that defendant go hereof without day and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at \$20.80.

Judgment entered January 20, 1922.

WALTER B. MALING,
Clerk. [15]

District Court of the United States, Southern Division of the Northern District of California.

No. 16,519.

FIRST NATIONAL BANK OF PARK RAPIDS,
Plaintiff,

vs.

R. F. PRAY,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled action came on regularly for trial on Friday, the 20th day of January, 1922, at 10 o'clock A. M. on that day, before Hon. Wm. C. Van Fleet, Judge, without a jury, a jury having been waived by written stipulation heretofore filed herein; the above-named plaintiff being represented by Willard P. Smith, Esq., of San Francisco, California, and the above-named defendant, R. F. Pray, being represented by Albert A. Rosenshine, Esq., and Vincent Surr, Esq., of San Francisco, California; and the following proceedings and none others were had, and the following evidence and none other was offered and received:

Thereupon an opening statement of said cause was made by counsel for plaintiff.

Testimony of W. M. Taber, for Plaintiff.

Thereupon W. M. TABER was called as a witness for the plaintiff and, after having been duly sworn, testified as follows:

Direct Examination.

I live at Park Rapids, Minnesota, and was the President [16] of the plaintiff bank during relations with the defendant, and had been President for twenty years. I recognize the note in question; that is the note in question; the guarantee in question is endorsed on the back of the note.

The note in question was thereupon offered in evidence and, being produced and examined by counsel for defendant, it was offered and received in evidence without objection, said note reading as follows:

“Park Rapids, Minn., March 22d, 1915.

“March 22d, 1916 after date (without grace), for value received, I promise to pay to the order of THE FIRST NATIONAL BANK OF PARK RAPIDS \$4500.00 Four Thousand Five Hundred, Dollars with interest at the rate of 8 per cent per annum, payable annually from date until paid. Payable at The First National Bank, Park Rapids, Minn.

“All the signers and endorsers hereby severally waive demand, notice of nonpayment, and protest.

“THE WHITE STORES COMPANY.

“By J. SHORE, Pres.

“By R. F. PRAY, Secretary.”

(Endorsed on the back as follows:)

(Testimony of W. M. Taber.)

“For value received I guarantee the payment of the within note at maturity or any time thereafter waiving demand, protest and notice of protest.

“J. SHORE.

“R. F. PRAY.”

“Endorsement on principal Balance due on Principal. 5/7 18 993.21 3506.79”

WITNESS.—(Continuing.) I had certain correspondence with Mr. Pray in regard to this note, and he was out here in California during that time. Letters passed between me at Park Rapids, Minnesota, and Mr. Pray here in California.

Counsel for plaintiff then produced and offered in evidence a letter which, upon being examined by counsel for defendant, was objected to by said counsel for defendant on the ground that it was immaterial, irrelevant and incompetent, and that it had nothing to do with the question of waiver of the statute or the question of forbearance; which objection was sustained; to which plaintiff's counsel [17] excepted, which exception was then and there allowed, and is herein designated as “Exception No. 1,” and plaintiff now assigns said ruling as error.

Said letter reads as follows (dated March 29, 1915):

“Mr. W. M. Taber,

“President The First National Bank,

“Park Rapids, Minn.

Dear Sir: Pursuant to your letter of March 22d, I am sending you herewith my check for \$1500.00 and also the two notes of the White Stores Co. for

\$1500.00 and \$4500.00 respectively. The first one named, we understand you are to cancel and keep on file with the other papers concerning this transaction.

“The payment on the \$4500.00 note to be made from time to time as mentioned in a former letter.

“I would appreciate greatly if you could send me maps showing the locations of the various lands described in the list which you sent me. Also advise me if the taxes are paid and the interest on the mortgages. Also advise me when the other mortgages expire.

“Please let me know all of the above before you transfer the Shore mortgages to me as I may prefer to let the matter stand as it is rather than assume the payment of the other mortgages. Also let me know in a general way whether you think it would be possible to renew the other mortgages providing they become due within a year.

“Thanking you for fixing this matter up for me, I remain,

“Yours very truly,

“R. F. PRAY.”

Plaintiff's counsel then produced and offered in evidence a letter dated October 7th, 1915, and the same being examined by counsel for defendant its introduction was objected to by him on the same grounds; which objection was sustained; to which plaintiff's counsel excepted, which exception was then and there allowed, and is herein designated as “Exception No. 2,” and plaintiff now assigns said ruling as error.

Said letter reads as follows:

“Park Rapids, Minnesota, October 7th, 1915.

“Mr. R. F. Pray,

“Westwood, Calif.

“Dear Sir: Yours of the 1st inst., to our Mr. Taber is at hand, and in regard to the White Stores’ note would say that I understand the conditions under which we are holding this note. Mr. Taber is still at the Rochester Hospital where he has undergone an operation for gall trouble. We expect him back here about the latter part of next week, as he seems to be getting along nicely.

“Yours very respectfully,

“M. C. SCHONEBERGER.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated February 21st, 1916, which upon examination was objected to by counsel for defendant; on the same grounds, and on the further ground that it was before the note became due, before the statute began to run; which objection was sustained; to which [18] ruling plaintiff’s counsel excepted; which exception was then and there allowed, and is hereby designated as “Exception No. 3.” Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

“Park Rapids, Minnesota, February 21st, 1916.

“Mr. R. F. Pray,

“Westwood, Calif.

“Dear Sir: I have yours of February 16th in reference to the J. Shere matter, and replying will

say that the \$17,800 mortgage to Wyman-Partridge is recorded before our mortgage and makes no mention of our mortgage in any way, and unless we could show that they knew about ours it probably would come ahead of the \$6,000 mortgage given to us by Mr. Shere, he told me that this mortgage could be taken up at any time, or that he could make almost any arrangement with them.

“I am writing Mr. Shere to-day concerning this matter and asking him to have it attended to; that is, to have them either release the \$17,800 mortgage and make a new one, or give us an agreement whereby the \$6,000 mortgage would be taken care before they look to their mortgage. I do not know for sure just what he can do. We are very anxious indeed, to have this matter cleaned up, and of course if you can now arrange to pay the balance of the \$5,000 mortgage, we will assign this mortgage to you, and do our best to get a second mortgage made on the property.

“Yours very respectfully,

“W. M. TABER.”

“I have not been able to get any interest out of Shere. The \$4,500 note will be due Mch 22d and I shall be very glad to have it taken up.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated May 23d, 1916, and upon examination, the introduction of said letter in evidence was objected to by counsel for defendant on the same ground, which objection was sustained. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby

designated as "Exception No. 4." Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

"Westwood, Cal. May 23, 1916.

"Mr. W. M. Taber,

"First National Bank,

"Park Rapids, Minn.

"Dear Sir: In reply to your letter of May 18th I wonder if it would not be possible in some way to have Mr. Shere adjust the mortgage in some way with Wyman-Partridge Co. by cancelling the old one and giving a new one to have the one they give you take precedence over it. It must have been Mr. Shere's intention to have the one they give you filled before the one for Wyman-Partridge. This may seem like an [19] unusual procedure but Mr. Shere is an unusual man and does things in an unusual manner and I will ask you to take the matter up along this line and see if you cannot get it fixed as I have suggested. What I mean is this. By endorsement J. Shere is responsible for the notes and to escape some of the liability on this, he might be able to make the trade.

"Is there any reason why you could not put in the claim on the notes which the White Stores Co. gave you in the amount of \$6,000, as the matter probably stands that way on their books. Any dividend paid would, therefore, be on the larger amount and it would make it so much less for someone to make up the difference.

"With the good times on the iron range I think the White Stores Co. will pay out much better

than intimated in your letter, especially if put under a competent manager and if we could get the mortgage adjusted as suggested and claim filed for \$6,000 instead of \$4,500, it would leave the amount to be made up very considerable less than now appears. The \$1,500 which I sent you a year ago could be kept as a credit to my personal account if you could handle it in this way. There is certainly no evidence to show that the White Stores Co. took up the \$1,500 note.

“I am not in position at this time to take advantage of the offer made in the last paragraph of your letter, but I would still be glad if you could give me the valuation of the land upon which Mr. Shere give the mortgage, as asked for in a former letter.

“Yours truly,

“R. F. PRAY.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated June 1st, 1916, and, upon examination, the introduction of said letter in evidence was objected to by counsel for defendant on the same ground, but not on the ground it is a copy, which objection was sustained. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 5.” Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

“June 1, 1916.

“Mr. R. F. Pray,

“Westwood, Cal.

“Dear Sir: I have yours of May 23rd in reference to the White Store Company's note, and replying will say that I feel very sure that Mr. Sheere is not able to get the Wyman-Partrich people to release their mortgage. They promised to let me hear from them before June 1st but up to this I have heard nothing from them. On a separate sheet I give you as near as I can the valuation of the lands that we have in the six thousand dollar (\$6000) mortgage. I am very anxious, of course, to get this matter cleaned up. I am ready and [20] willing to do anything I can to help you but as you know, of course, when the loan was made it was made on the stripe of your endorsement and it is really you that we are looking to for our payment and I would appreciate it very much if you would arrange at this time to take the loan up as it is due and we, of course, ought to have our money. If you can not take it all up at this time I would suggest that you pay us what you can and I will take a new note from you bearing interest at the rate of six per cent and will hold the White Stores notes as collateral security to your note.

“I inclose you, herewith, a few blanks and you can fill them out payable to us in such amounts as you will be able to take care of and return to me and we will do our best to get what we can out of the White Stores Company's assets on the

strength of the six thousand dollar (\$6000) notes.

"I inclose you a little assignment or statement concerning the fifteen hundred dollars we now have and if satisfactory you can sign and return to me so that I can file a claim for the six thousand dollars (\$6000) and interest.

"I am very sorry, indeed, that this has fallen so heavily on you but see no other way out of it at the present time.

"Yours truly,

"President."

Counsel for plaintiff hereupon produced and offered in evidence a letter dated November 19th, 1918, and, upon examination, counsel for defendant made the same objection to its introduction in evidence, and further objected to it on the ground that it has an offer of settlement made by the bank to the defendant, and that the offer was never accepted; which objection was sustained. To said ruling plaintiff's counsel excepted, which exception was then and there allowed, and is hereby designated as "EXCEPTION No. 6." Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

"November 19th, 1918.

"Mr. R. F. Pray,

"Westwood, Cal.

"Dear Sir: We have been hoping we would be able to get something more out of the trustee in the White Stores Company but now have absolutely given up all hopes. We are still holding a

loan of \$4500 dated March 23, 1915 and upon which on May 17th, 1918, we received from the trustee \$993.21 which has been endorsed on the note, leaving a balance of \$3506.79 and interest.

"I always feel it is unnecessary to make expense if it can be avoided and at this time am going to make you this proposition Mr. Pray. You send us one-half of the balance of this note without taking into consideration the interest, that is \$1753.40 and we will cancel your name from the back of the note which entirely releases you. I feel that this [21] is more than meeting you half way and trust we will receive a remittance as above stated by return mail. This holds good only that you do so this month.

"We would be willing to take Liberty Bonds if you prefer.

"Yours truly,

"Pres."

Counsel for plaintiff hereupon produced and offered in evidence a letter dated November 26, 1918, and, upon examination, counsel for defendant made the same objection to the introduction of said letter in evidence, which objection was sustained. To said ruling plaintiff's counsel excepted, which exception was then and there allowed, and is hereby designated as "EXCEPTION No. 7." Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

“Westwood, Cal., November 26, 1918.

“W. M. Taber,

“Pres., First National Bank,

“Park Rapids, Minn.

“Dear Sir: I have received your letter of Nov. 19th in regard to the notes of the White Stores Co., and wish to thank you for the kind manner in which you have referred to them.

“By same mail I also had a letter from the new trustee of the White Stores Co. in regard to final hearing, and have written my attorneys, Courtney & Courtney, for a little further information. I should hear from them in a few days and will then communicate with you.

“With personal regards, I remain,

“Very truly yours,

“R. F. PRAY.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated December 2d, 1918, and, upon examination, the introduction of said letter in evidence was objected to by counsel for defendant on the grounds before stated, which objection was sustained. To said ruling plaintiff's counsel excepted, which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 8.” Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

“Dec. 2nd, 1918.

“Mr. R. F. Pray,

“Westwood, Calif.

“Dear Sir: I am just in receipt of yours of No-

30. *First National Bank of Park Rapids*

vember 26th and, as stated in my former letter, we will be glad to have you give this due consideration at as early a date as possible [22] and advise us.

“Kindly give us your final answer between now and the 15th of this month.

“With personal regards, I am,

“Very sincerely yours,

“W. M. TABER.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated December 11th, 1918, and, upon examination, to the introduction of said letter in evidence counsel for defendant made the same objection as heretofore, which objection was sustained. To said ruling plaintiff's counsel excepted, which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 9.” Plaintiff now assigns said ruling, to which said exception was taken, as error. Said letter reads as follows:

“Westwood, Cal., Dec. 11, 1918.

“Wm. McTaber,

“Pres., First National Bank,

“Park Rapids, Minn.

“Dear Sir: Referring to our recent correspondence in regard to the White Stores notes. I have just to-day received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee, considerable amount for distribution to the creditors of that company, and the distribution would soon be made.

“When this is done, I should be very glad to

hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.

“Very truly yours, ;

“R. F. PRAY.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated December 16th, 1918, from the plaintiff to the defendant, the introduction of which in evidence was overruled by the Court. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 10.” Plaintiff now assigns said ruling, to which said exception was taken, as error.

Said letter reads as follows:

“Park Rapids, Minnesota, Dec. 16th, 1918.

“Mr. R. F. Pray,

“Westwood, Calif.

“My dear Mr. Pray: I have yours of December 11th in reference to the White Stores Company note and replying will say this. Of course, you realize I am very anxious, indeed, to get [23] this matter cleaned up and off our books.

“If you care to make remittance as per my former letter, at this time, I will do this. I will agree to give you one half of any further amounts that we receive from the trustee. I should think this would be quite satisfactory to you.

“Kindly let me hear from you concerning this and oblige.

“Yours truly,

“W. M. TABER,

“President.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated July 31st, 1919, and, upon examination, the introduction of said letter in evidence was objected to by counsel for defendant on the same grounds as heretofore, which objection was sustained. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 11.” Plaintiff now assigns said ruling, to which said exception was taken, as error.

Said letter reads as follows:

“Park Rapids, Minnesota, 7/31/19.

“Mr. R. F. Pray,

“Westwood, Cal.

“My Dear Sir: The First National Bank of Park Rapids has turned over to me, for adjustment, a note upon which you appear as a guarantor, dated March 22nd, 1915, and upon which there remains still due, the sum of \$3506.79 and interest.

“You are of course familiar with the entire matter and there is no necessity for my going into details, except to advise you that the Bank feels that they must do something to protect its interests. I am advised by the Receiver of the White Stores Company that it will be some time before they can

(Testimony of W. M. Taber.)

be close up this matter, as they have sued the Red River Lumber Company and except to proceed on the double stock-holders liability. However I am instructed to advise you that to clean this matter up, the Bank will accept the face of the note and will return to you all dividends that they receive in connection with the receivership.

“In the event that you do not see fit to accept this proposition, the Bank have instructed me to sue on the note. This would be distasteful to the Bank, as well as the writer and I trust such course will not be necessary.

“Please let me hear from you at your earliest convenience. With kindest personal regards to yourself and family. I am,

“Very Truly Yours,

“MARK J. WOOLLEY.”

WITNESS. — (Continuing.) There was some correspondence between Mr. Woolley and Mr. Pray.

Mr. ROSENSHINE. — I will concede that Mr. Woolley was the attorney [24] for the Bank.

WITNESS.—(Continuing.) He was acting for the Bank at that time.

Counsel for plaintiff hereupon produced and offered in evidence a letter dated August 8th, 1919 (in response to the letter last offered in evidence), the introduction of which was objected to on the same grounds, and in addition thereto objection was made to the admission of the answer on the

(Testimony of W. M. Taber.)

ground that it sets forth a conditional compromise, if it sets forth a compromise; which objection was sustained. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby designated as "EXCEPTION No. 12." Plaintiff now assigns said ruling, to which said exception was taken, as error.

Said letter reads as follows:

"Westwood, Calif., Aug. 8, 1919.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"My Dear Mark: I have your letter of July 31st relative to the White Stores note given to the First National Bank, Park Rapids, and bearing my endorsement.

"Last spring Mr. Taben wrote me that the balance of the note was about \$3,500.00 and that if we would send one-half of this amount, he would cancel the entire obligation against the White Stores and against me as an endorser. At that time I wrote Mr. Shere and told him about this offer and asked him to pay half of this settlement, and if he did, I would pay the other half and thus wipe this note out. Mr. Shere did not respond to this letter and I have written him again on the subject.

"This whole affair of the White Stores Co. has been a most unfortunate thing for me as I lost \$20,000.00 thru this investment and never felt I was responsible for it morally as I had nothing to do with the management of the stores.

“In addition to this loss I have already sent Mr. Taber \$1500.00 and am very anxious, indeed, to see it cleaned up, as it certainly has been a source of worry and anxiety to me.

“Would you not kindly ascertain Mr. Shere’s address and take the matter up with him direct and see if you cannot get half of the amount that Mr. Taber offered to settle for, and I will send the other half and get it out of the way.

“Hoping you will do this for me, I remain,

“Very truly yours,

“R. F. PRAY.” [25]

Counsel for plaintiff hereupon produced and offered in evidence a letter dated August 29th, 1919, and, upon examination, counsel for defendant made the same objection to the introduction of said letter in evidence; which objection was sustained. To said ruling plaintiff’s counsel excepted; which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 13.” Plaintiff now assigns said ruling, to which said exception was taken, as error.

Said letter reads as follows:

“Park Rapids, Minnesota, 8/29/19.

“Mr. R. F. Pray,

“Westwood, Cal.

“My Dear Mr. Pray: I have a letter from J. Shere dated the 20th inst. in reply to a letter from me written after I had received your letter, in which he advises me that he has written you that he can do nothing at this time.

“I have again taken the matter up with Mr.

Taber and he tells me that he wrote you Nov. 19th, 1918, making you the proposition you suggested in your letter, but that same was contingent upon an acceptance during the month of Nov., 1918 and inasmuch as you did not see fit to accept same, he now advised me that he would not settle on that basis.

“You will understand that I have no discretion in this matter, the Bank simply renews the offer I made you in my former letter and that is contingent upon an early adjustment.

“I cannot help but feel that Shere is not doing the square thing with you, I see him frequently, he is located in the Andrus building two doors from my father’s office and I believe that he is making money, but of course has no tangible assets.

“The Bank looks to you as a responsible party for this money, anything that I could do for you in getting a settlement out of Shere I would be glad to do, but the Bank insists upon a settlement in the immediate future or they will insist upon an action being started to recover the total amount due with interest.

“I appreciate your position in this matter and realize that the whole affair was an unfortunate one, but you realize that banks look at the business, not the human side of questions.

“I shall greatly appreciate an early reply and trust that same will be adjusted without the un-

pleasantness of having to institute an action.

“Very truly yours,

“MARK J. WOOLLEY.”

Counsel for plaintiff hereupon produced and offered in evidence a letter dated September 19th, 1919, and, upon examination, the introduction of said letter in evidence was objected to by counsel for defendant [26] on the same grounds as heretofore stated, and in addition that the language of the letter is such that there can be no question that there is no request to forbear, the language being, “Inasmuch as the bank insists upon its legal right to sue the endorsers of the note, for which, however, I do not blame them, I suggest that they go ahead and sue either Mr. Shere or myself, or jointly, and ascertain what the outcome will be.” This objection was sustained. To said ruling plaintiff’s counsel excepted; which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 14.” Plaintiff now assigns said ruling, to which said exception was taken, as error.

Said letter reads as follows:

“Westwood, Calif., Sept. 19, 1919.

“Mr. Mark J. Woolley,

“Park Rapids, Minn.

“Dear Sir: Since our last correspondence, I have tried very hard to get Mr. Shere to pay his half of the remaining portion of the note due the bank at Park Rapids but without any success whatever.

“Inasmuch as the bank insists upon its legal right to sue the endorsers of the note, for which,

however, I do not blame them, I suggest that they go ahead and sue either Mr. Shere or myself, or jointly, and ascertain what the outcome will be.

“Of course I am very sorry to have this action taken but see no way in which my legal rights may be determined any other way.

“Very truly yours,

“R. F. PRAY.”

Counsel for plaintiff hereupon produced and offered in evidence two letters dated respectively September 29th, 1919, and October 4th, 1919, and, upon examination, the introduction of said letters in evidence was objected to by counsel for defendant on the same grounds as heretofore stated, and as to the letter of October 4th the additional ground that there is nothing in the letter which could possibly be construed as a waiver of the statute. This objection was sustained. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby designated as “EXCEPTION No. 15.” Plaintiff now assigns [27] said ruling, to which said exception was taken, as error.

Said letter of September 29, 1919, reads as follows:

“Park Rapids, Minnesota, 9/29/19.

“Mr. R. F. Pray,

“Westwood, Cal.

“Dear Sir: I have your favor of the 19th inst. and note what you say in regard to being unable to secure any kind of a settlement out of J. Shere.

“In case I should be able to secure a note from

Mr. Shere running to you, for one-half of the amount due, would you in that case adjust this matter with the Bank?

“If you are interested in this proposition advise me and I will see what I can do. In any event please let me know what you think about same.

“Yours Truly,

“MARK J. WOOLLEY.”

Said letter of October 4, 1919, reads as follows:

“Westwood, Calif., Oct. 4, 1919.

“Mr. Mark J. Woolley,

“Park Rapids, Minn.

“Dear Sir: In reply to your letter of Sept. 29th:

“I would not be satisfied to pay half the note with the understanding that Mr. Shere would give his note for the balance, as I am afraid Mr. Shere would not be in position to pay the note when it became due. I had thought you were proceeding to put this matter in court, so I referred the matter to my attorney out here and he thinks it will be satisfactory, in order to determine just what my liability is, to have suit brot on the note.

“Sorry I cannot see my way on account of the reason given to take up Mr. Shere’s proposition.

“Yours truly,

“R. F. PRAY.”

Counsel for plaintiff hereupon produced and offered in evidence two letters dated respectively June 26th, 1920, and July 22d, 1920, and, upon examination, the introduction of said letters in evidence was objected to by counsel for defendant on the same grounds as heretofore stated. This

objection was sustained. To said ruling plaintiff's counsel excepted; which exception was then and there allowed, and is hereby designated as "EXCEPTION No. 16." Plaintiff now assigns said ruling, to which said exception was taken, as error.

Said letter of June 26th, 1920, reads as follows:

"Park Rapids, Minn., June 26th, 1920.

"Mr. R. F. Pray,

"Westwood, Cal.

"My dear Sir: Mr. Taber has just been in to see me again in regard [28] to the notes he holds in which you are interested.

"He has just figured up the total amount, including interest, and the same amounts to about \$5,300, which does not figure all of the interest that is due. However, estimating it upon a basis of \$5,000, Mr. Taber requested that I again write you making you the following proposition:

"That the Bank will accept from you and give you a release from all further liability, the sum of \$2,500. and pay you one-half of any amounts that may be realized from dividends yet to be paid from the trusteeship of the White Stores Company.

"He would rather clean this matter up with you in this way than to be forced to go to the expense and trouble and the incidental unpleasantness of the institution of a lawsuit. He tells me that of course you were aware of the fact that at the time this money was loaned that he looked to you as the responsible individual in the transaction.

“I trust that you can see your way clear to adjust this matter on this basis and we shall be very glad if you so desire to institute an action in the State of Minnesota to recover from Mr. Shere, who, I think, is probably making some money. But in any event kindly give me a definite answer as to your intention in regard to adjusting this matter so that there will be no question as to what course the Bank must pursue.

“Very truly yours,

“MARK J. WOOLLEY.”

Said letter of July 22d, 1920, reads as follows:

“Westwood, Calif., July 22, 1920.

“Mr. Mark J. Woolley,

“Park Rapids, Minn.

“My Dear Mr. Woolley:

“Since receiving your letter of June 26th in regard to the White Stores notes, which I endorsed, I have consulted with my attorneys here and they advise me to let the matter go to suit, as in that way my legal rights will be fully protected in the matter.

“I appreciate very much the lenient manner in which Mr. Taber has treated this matter, and am sorry I will not be in position to take advantage of his kindness. I think possibly the best for all concerned will be to let the matter go to trial.

“Hoping you are enjoying the best of good luck in your practice and in your business, I remain,

“Yours truly,

“R. F. PRAY.”

WITNESS.—(Continuing.) All of these letters that the Bank received from Mr. Pray referred to this particular note, and there was no other indebtedness during that period except this \$4500 note.

Plaintiff thereupon rested.

The defendant thereupon moved for a nonsuit, which [29] was granted. To which nonsuit plaintiff's counsel excepted, which exception was thereupon allowed and is hereby designated as "EXCEPTION No. 17." Plaintiff now assigns said ruling, to which said exception was taken, as error.

AND BE IT FURTHER REMEMBERED that the above and foregoing bill of exceptions is a full, true and correct statement of all the evidence in the cause, also of all objections, rulings and exceptions and other proceedings in and upon the trial. And now, within due and proper time, said plaintiff presents and tenders this its said bill of exceptions to said Court, and prays that the same may be settled, approved and allowed, signed and certified.

Dated, San Francisco, March 1st, 1922.

FIRST NATIONAL BANK OF PARK
RAPIDS,

Said Plaintiff,

By WILLIAM P. SMITH,

Its Attorney.

Stipulation Approving Bill of Exceptions.

It is hereby stipulated and agreed that the fore-

going bill of exceptions is true and correct in all particulars, and that the same may be made a part of the records in the above-entitled case.

Dated, San Francisco, March 1st, 1922.

**FIRST NATIONAL BANK OF PARK
RAPIDS,**

Plaintiff.

By WILLIAM P. SMITH,

Its Attorney.

R. F. PRAY,

Defendant.

By ALBERT A. ROSENSHINE, and

GOLDMAN, NYE & SURR,

His Attorneys. [30]

Order Settling Bill of Exceptions.

United States of America,

Northern District of California,—ss.

In the matter of the foregoing bill of exceptions, duly presented in time by the plaintiff, First National Bank of Park Rapids, plaintiff in error, IT IS HEREBY ORDERED by said Court that said bill of exceptions be, and the same is hereby, settled, allowed and approved as true and correct in all particulars, and the same is hereby made a part of the records in the above-entitled cause.

Given and made at San Francisco, California, this 8th day of March, 1922.

WM. C. VAN FLEET,

United States District Judge.

Receipt of a copy of the within bill of exceptions is hereby admitted this 2d day of March, 1922.

ALBERT A. ROSENSHINE,
GOLDMAN, NYE & SURR,

Attys. for Deft.

[Endorsed]: Filed Mar. 8, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

In the District Court of the United States, Southern
Division of the Northern District of California,
Second Division.

No. 16,519.

FIRST NATIONAL BANK OF PARK RAPIDS,
Plaintiff,

vs.

R. F. PRAY,

Defendant.

**Petition for Writ of Error and Order Directing
Writ to Issue.**

The above-named plaintiff, feeling itself aggrieved by the judgment of the Court entered herein on the 20th day of January, 1922, comes now by its attorneys, Willard P. Smith and Mark K. Wooley, and petitions this Honorable Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States on that behalf made and provided.

WILLARD P. SMITH,
MARK K. WOOLEY,
Attorneys for Plaintiff.

Let a writ of error in the above cause issue as prayed for in the petition.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Mar. 27, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the District Court of the United States, Southern
Division of the Northern District of California.

No. 16,519.

FIRST NATIONAL BANK OF PARK RAPIDS,
Plaintiff,

vs.

R. F. PRAY,
Defendant.

Assignments of Error.

Now comes the plaintiff in error herein and says that in the record and proceedings in the above-entitled action there is manifest error and now makes, presents and files the following assignments of error on which it will rely, as follows, to wit:

I.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 1; said letter reads as follows: (Dated March 29, 1915.)

“Mr. W. M. Taber,

“President the First National Bank,

“Park Rapids, Minn.

Dear Sir: Pursuant to your letter of March 22d, I am sending you herewith my check for \$1500, and also the two notes of the White Stores Co. for \$1500 and \$4500 respectively. The first one named, we understand you are to cancel and keep on file with the other papers concerning this transaction.

“The payment on the \$4500.00 note to be made from time to time as mentioned in a former letter.

“I would appreciate greatly if you could send me maps showing the locations of the various lands described in the list which you sent me. Also advise me if the taxes are paid and the interest on the mortgages. Also advise me when the other mortgages expire.

“Please let me know all of the above before you transfer the Shore mortgages to me as I may prefer to let the matter stand as it is rather than assume the payment of the other mortgages. Also let me know in a general way whether you think it would be possible to renew the other mortgages [33] providing they become due within a year.

“Thanking you for fixing this matter up for me, I remain,

“Yours very truly,

“R. F. PRAY.”

Plaintiff then and there duly excepted.

II.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a

certain letter which was offered and introduced in evidence by the plaintiff, as set forth in plaintiff's bill of exceptions, Exception No. 2. Said letter reads as follows:

"Park Rapids, Minnesota, October 7th, 1915.

"Mr. R. F. Pray,

"Westwood, Calif.

Dear Sir: Yours of the 1st inst., to our Mr. Taber is at hand, and in regard to the White Stores' note would say that I understand the conditions under which we are holding this note. Mr. Taber is still at the Rochester Hospital where he has undergone an operation for gall trouble. We expect him back here about the latter part of next week, as he seems to be getting along nicely.

"Yours very respectfully,

"M. C. SCHONEBERGER."

Plaintiff then and there duly excepted.

III.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 3; said letter reads as follows:

"Park Rapids, Minnesota, February 21, 1916.

"Mr. R. F. Pray,

"Westwood, Calif.

"Dear Sir: I have yours of February 16th in reference to the J. Shere matter, and replying will say that the \$17,800 mortgage to Wyman-Partridge is recorded before our mortgage and makes no men-

tion of our mortgage in any way, and unless we could show that they knew about ours it probably would come ahead of the \$6,000 mortgage given to us by Mr. Shere, he told me that this mortgage could be taken up at any time, or that he could make almost any arrangements with them.

"I am writing Mr. Shere to-day concerning this matter and asking him to have it attended to; that is, to have them either release the \$17,800 mortgage and to make a new one, or give us an agreement whereby the \$6000 mortgage would be taken care before they look to their mortgage. I do not know for sure just what he can do. We are very anxious [34] indeed, to have this matter cleaned up, and of course if you can now arrange to pay the balance of the \$5,000 mortgage, we will assign this mortgage to you, and do our best to get a second mortgage made on the property.

"Yours very respectfully,
W. M. TABER."

"I have not been able to get any interest out of Shere. The \$4500 note will be due Mch 22d and I shall be very glad to have it taken up."

Plaintiff then and there duly excepted.

IV.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 4. Said letter read as follows:

“Westwood, Cal., May 23, 1916.

“Mr. W. M. Taber,

“First National Bank,

“Park Rapids, Minn.

“Dear Sir: In reply to your letter of May 18th, I wonder if it would not be possible in some way to have Mr. Shere adjust the mortgage in some way with Wyman-Partridge Co. by cancelling the old one and giving a new one to have the one they give you take precedence over it. It must have been Mr. Shere's intention to have the one they give you filed before the one for Wyman-Partridge. This may seem like an unusual procedure, but Mr. Shere is an unusual man and does things in an unusual manner and I will ask you to take the matter up along this line and see if you cannot get it fixed as I have suggested. What I mean is this: By endorsement J. Shere is responsible for the notes and to escape some of the liability on this, he might be able to make the trade.

“Is there any reason why you could not put in the claim on the notes which the White Stores Co. gave you in the amount of \$6,000 as the matter probably stands that way on their books. Any dividend paid would, therefore, be on the larger amount and it would make it so much less for someone to make up the difference.

“With the good times on the iron range I think the White Stores Co. will pay out much better than intimated in your letter, especially if put under a competent manager and if we could get the mortgage adjusted as suggested and claim filed for

\$6000 instead of \$4500, it would leave the amount to be made up very considerable less than now appears. The \$1500 which I sent you a year ago could be kept as a credit to my personal account if you could handle it in this way. There is certainly no evidence to show that the White Stores Co. took up the \$1500 note.

"I am not in position at this time to take advantage of the offer made in the last paragraph of your letter, but I would still be glad if you could give me the valuation of the land upon which Mr. Shere gave the mortgage, as asked for in a former letter.

"Yours truly,

"R. F. PRAY."

Plaintiff then and there duly excepted. [35]

V.

Said Court *errect* in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 5. Said letter read as follows:

June 1, 1916.

"Mr. R. F. Pray,

"Westwood, Cal.

"Dear Sir: I have yours of May 23d in reference to the White Store Company's note, and replying will say that I feel very sure that Mr. Sheerer is not able to get the Wyman-Patrich people to release their mortgage. They promised to let me hear from them before June 1st but up to this I have heard nothing from them. On a separate sheet I give you

as near as I can the valuation of the lands that we have in the six thousand dollar (\$6,000) mortgage. I am very anxious, of course, to get this matter cleaned up. I am ready and willing to do anything I can to help you but as you know, of course, when the loan was made, it was made on the stripe of your endorsement and it is really you that we are looking to for our payment and I would appreciate it very much if you would arrange at this time to take the loan up as it is due and we, of course, ought to have our money. If you cannot take it all up at this time I would suggest that you pay us what you can and I will take a new note from you bearing interest at the rate of six per cent and will hold the White Stores notes as collateral security to your note.

“I enclose you, herewith, a few blanks and you can fill them out payable to us in such amounts as you will be able to take care of and return to me and we will do our best to get what we can out of the White Store Company’s assets on the strength of the six thousand dollars (\$6000) notes.

“I enclose you a little assignment or statement concerning the fifteen hundred dollars we now have and if satisfactory you can sign and return to me so that I can file a claim for the six thousand dollars (\$6000) and interest.

“I am very sorry, indeed, that this has fallen so heavily on you, but see no other way out of it at the present time.

“Yours truly,

“_____,”

“President.”

Plaintiff then and there duly excepted.

VI.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain [36] letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 6. Said letter read as follows:

“November 19th, 1918.

“Mr. R. F. Pray,

“Westwood, Cal.

“Dear Sir: We have been hoping we would be able to get something more out of the trustee in the White Stores Company but now have absolutely given up all hopes. We are still holding a loan of \$4500 dated March 23, 1915 and upon which on May 17th, 1918 we received from the trustee \$993.21 which has been endorsed on the note, leaving a balance of \$3506.79 and interest.

“I always feel it is unnecessary to make expense if it can be avoided and at this time am going to make you this proposition, Mr. Pray. You send us one-half of the balance of this note without taking into consideration the interest, that is \$1753.40 and we will cancel your name from the back of the note which entirely releases you. I feel that this is more than meeting you half way and trust we will receive a remittance as above stated by return mail. This holds good only that you do so this month.

“We would be willing to take Liberty bonds if you prefer.

“Yours truly,

“_____,
Pres.”

Plaintiff then and there duly excepted.

VII.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 7. Said letter reads as follows:

“Westwood, Cal., November 26, 1918.

“W. M. Taber,

“Pres., First National Bank,

“Park Rapids, Minn.

“Dear Sir: I have received your letter of Nov. 19th in regard to the notes of the White Stores Co. and wish to thank you for the kind manner in which you have referred to them.

“By same mail I also had a letter from the new trustee of the White Stores Co. in regard to final hearing, and have written my attorneys, Courtney & Courtney, for a little further information. I should hear from them in a few days and will then communicate with you.

“With personal regards, I remain,

“Very truly yours,

“R. F. PRAY.”

Plaintiff then and there duly excepted.

VIII.

Said Court erred in sustaining the objection of the [37] defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 8. Said letter reads as follows:

“Dec. 2d, 1918.

“Mr. R. F. Pray,
“Westwood, Calif.

“Dear Sir: I am just in receipt of yours of November 26th and, as stated in my former letter, we will be glad to have you give this due consideration at as early a date as possible and advise us.

“Kindly give up your final answer between now and the 15th of this month.

“With personal regards, I am,

“Very sincerely yours,

W. M. TABER.”

Plaintiff then and there duly excepted.

IX.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 9. Said letter reads as follows:

“Westwood, Cal., Dec. 11, 1918.

“Wm. M. Taber,

“Pres., First National Bank,

“Park Rapids, Minn.

“Dear Sir: Referring to your recent correspond-

ence in regard to the White Stores notes. I have just to-day received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee, considerable amount for distribution to the creditors of that company, and the distribution would soon be made.

“When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.

“Very truly yours,

“R. F. PRAY.”

Plaintiff then and there duly excepted.

X.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 10. Said letter reads as follows: [38]

“Park Rapids, Minnesota, Dec. 16th, 1918.

“Mr. R. F. Pray,

“Westwood, Calif.

“My Dear Mr. Pray: I have yours of December 11th in reference to the White Stores Company note and replying will say this. Of course, you realize I am very anxious, indeed, to get this matter cleaned up and off our books.

“If you care to make remittance as per my former letter at this time, I will do this. I will agree to give you one-half of any further amounts that we

receive from trustee. I should think this would be quite satisfactory to you.

"Kindly let me hear from you concerning this and oblige.

"Yours truly,

"W. M. TABER,

"President."

Plaintiff then and there duly excepted.

XI.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 11. Said letter reads as follows:

"Park Rapids, Minnesota, 7/31/19.

"Mr. R. F. Pray,

"Westwood, Cal.

"My Dear Sir: The First National Bank of Park Rapids has turned over to me, for adjustment, a note upon which you appear as a guarantor, dated March 22d, 1915, and upon which there remains still due, the sum of \$3506.79 and interest.

"You are of course familiar with the entire matter and there is no necessity for my going into details, except to advise you that the Bank feels that they must do something to protect its interests. I am advised by the Receiver of the White Stores Company that it will be some time before they can close up this matter, as they have sued the Red River Lumber Company and expect to proceed on the double stock-holders liability. However, I am

instructed to advise you that to clean this matter up, the Bank will accept the face of the note and will return to you all dividends that they receive in connection with the receivership.

“In the event that you do not see fit to accept this proposition, the Bank have instructed me to sue on the note. This would be distasteful to the Bank, as well as the writer and I trust such course will not be necessary.

“Please let me hear from you at your earliest convenience. With kindest personal regards to yourself and family, I am,

“Very Truly Yours,

“MARK J. WOOLEY.”

Plaintiff then and there duly excepted. [39]

XII.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 12. Said letter reads as follows :

“Westwood, Calif., Aug. 8, 1919.

“Mr. Mark J. Wooley,

“Park Rapids, Minn.

“My Dear Mark: I have your letter of July 31st relative to the White Stores note given to the First National Bank, Park Rapids, and bearing my endorsement.

“Last spring Mr. Taber wrote me that the balance of the note was about \$3500.00 and that if we would send one-half of this amount, he would cancel the

entire obligation against the White Stores and against me as an endorser. At that time I wrote Mr. Shere and told him about this offer and asked him to pay half of this settlement, and if he did, I would pay the other half and thus wipe this note out. Mr. Shere did not respond to this letter and I have written him again on the subject.

“This whole affair of the White Stores Co. has been a most unfortunate thing for me as I lost \$20,000.00 thru this investment and never felt I was responsible for it, morally, as I had nothing to do with the management of the stores.

“In addition to this loss I have already sent Mr. Taber \$1500.00 and am very anxious, indeed, to see it cleaned up, as it certainly has been a source of worry and anxiety to me.

“Would you not kindly ascertain Mr. Shere’s address and take the matter up with him direct and see if you cannot get half of the amount that Mr. Taber offered to settle for, and I will send the other half and get it out of the way.

“Hoping you will do this for me, I remain,

“Very truly yours,

“R. F. PRAY.”

Plaintiff then and there duly excepted.

XIII.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff’s bill of exceptions, Exception No. 13. Said letter reads as follows:

“Park Rapids, Minnesota, 8/29/19.

“Mr. R. F. Pray,

“Westwood, Cal.

“My Dear Mr. Pray: I have a letter from J. Shere dated the 20th inst. in reply to a letter from me written after I had received your letter, in which he advises me that he has written you that he can do nothing at this time.” [40]

“I have again taken the matter up with Mr. Taber and he tells me that he wrote you Nov. 19th, 1918, making you the proposition you suggested in your letter, but that same was contingent upon an acceptance during the month of Nov. 1918 and inasmuch as you did not see fit to accept same, he now advises me that he would not settle on that basis.

“You will understand that I have no discretion in this matter, the Bank simply renews the offer I made you in my former letter and that is contingent upon an early adjustment.

“I cannot help but feel that Shere is not doing the square thing with you, I see him frequently, he is located in the Andrus Building two doors from my father's office and I believe that he is making money, but of course has no tangible assets.

“The Bank looks to you as a responsible party for this money, anything that I could do for you in getting a settlement out of Shere I would be glad to do, but the Bank insists upon a settlement in the immediate future or they will insist upon an action being started to recover the total amount due with interest.

“I appreciate your position in this matter and

realize that the whole affair was an unfortunate one, but you realize that banks look at the business, not the human side of questions.

"I shall greatly appreciate an early reply and trust that same will be adjusted without the unpleasantness of having to institute an action.

"Very truly yours,

MARK J. WOOLEY."

Plaintiff then and there duly excepted.

XIV.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of a certain letter which was offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 14. Said letter reads as follows:

"Westwood, Calif., Sept. 19, 1919.

"Mr. Mark J. Wooley,

"Park Rapids, Minn.

"Dear Sir: Since our last correspondence, I have tried very hard to get Mr. Shere to pay his half of the remaining portion of the note due the bank at Park Rapids, but without any success whatever.

"Inasmuch as the bank insists upon its legal right to sue the endorsers of the note, for which, however, I do not blame them, I suggest that they go ahead and sue either Mr. Shere or myself, or jointly, and ascertain what the outcome will be.

"Of course, I am very sorry to have this action

taken but see no way in which my legal rights may be determined any other way.

“Very truly yours,

“R. F. PRAY.”

Plaintiff then and there duly excepted. [41]

XV.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of two certain letters, dated respectively September 29th, 1919 and October 4th, 1919, which were offered and introduced in evidence by the plaintiff as set forth in plaintiff's bill of exceptions, Exception No. 15. Said letter of September 29, 1919, reads as follows:

“Park Rapids, Minnesota, 9/29/19.

“Mr. R. F. Pray,

“Westwood, Cal.

“Dear Sir: I have your favor of the 19th inst. and note what you say in regard to being unable to secure any kind of a settlement out of J. Shere.

“In case I should be able to secure a note from Mr. Shere running to you, for one-half of the amount due, would you in that case adjust this matter with the Bank?

“If you are interested in this proposition advise me and I will see what I can do. In any event please let me know what you think about same.

“Yours Truly,

“MARK J. WOOLEY.”

Said letter of October 4, 1919, reads as follows:

“Westwood, Calif., Oct. 4, 1919.

“Mr. Mark J. Wooley,

“Park Rapids, Minn.

“Dear Sir: In reply to your letter of Sept. 29th:

“I would not be satisfied to pay half the note with the understanding that Mr. Shere would give his note for the balance, as I am afraid Mr. Shere would not be in a position to pay the note when it became due. I had thought you were proceeding to put this matter in court, so I referred the matter to my attorney out here and he thinks it will be satisfactory, in order to determine just what my liability is, to have suit brot on the note.

“Sorry I cannot see my way on account of the reason given to take up Mr. Shere’s proposition.

“Yours truly,

“R. F. PRAY.”

Plaintiff then and there duly excepted.

XVI.

Said Court erred in sustaining the objection of the defendant to the introduction in evidence of two certain letters dated respectively June 26th, 1920 and July 22d, 1920, which were offered and introduced in evidence by the plaintiff, as set forth in plaintiff’s bill of exceptions, Exception No. 16. Said letter of June 26th, 1920, reads as follows.
[42]

“Park Rapids, Minn., June 26th, 1920.

“Mr. R. F. Pray,

“Westwood, Cal.

“My dear Sir: Mr. Taber has just been in to see

me again in regard to the notes he holds in which you are interested.

“He has just figured up the total amount, including interest, and the same amounts to about \$5,300. which does not figure all of the interest that is due. However, estimating it upon a basis of \$5,000. Mr. Taber requested that I again write you making you the following proposition:

“That the Bank will accept from you and give you a release from all further liability, the sum of \$2,500, and pay you one-half of any amounts that may be realized from dividends yet to be paid from the trusteeship of the White Stores Company.

“He would rather clean this matter up with you in this way then to be forced to go to the expense and trouble and the incidental unpleasantness of the institution of a law suit. He tells me that of course you were aware of the fact that at the time this money was loaned that he looked to you as the responsible individual in the transaction.

“I trust that you can see your way clear to adjust this matter on this basis and we shall be very glad if you so desire to institute an action in the State of Minnesota to recover from Mr. Shere, who, I think, is probably making some money. But in any event kindly give me a definite answer as to your intention in regard to adjusting this matter so that there will be no question as to what course the Bank must pursue.

“Very truly yours,

“MARK J. WOOLLEY.”

Said letter of July 22d, 1920, reads as follows:

“Westwood, Calif., July 22, 1920.

“Mr. Mark J. Woolley,

“Park Rapids, Minn.

“My Dear Mr. Woolley:

“Since receiving your letter of June 26th in regard to the White Stores notes, which I endorsed, I have consulted with my attorneys here and they advise me to let the matter go to suit, as in that way my legal rights will be fully protected in the matter.

“I appreciate very much the lenient manner in which Mr. Taber has treated this matter, and am sorry I will not be in position to take advantage of his kindness. I think possibly the best for all concerned will be to let the matter go to trial.

“Hoping you are enjoying the best of good luck in your practice and in your business, I remain,

“Yours truly,

“R. F. PRAY.”

Plaintiff then and there duly excepted.

XVII.

Said Court erred in granting a nonsuit to defendant as set forth in plaintiff's bill of exceptions, Exception No. 17 plaintiff then and there duly excepted. [43]

XVIII.

Said Court erred in giving, making, rendering, entering and filing its judgment in the above-entitled action in favor of the above-named defendant and against the above-named plaintiff.

XIX.

Said Court erred in not giving, making, rendering and filing its final judgment in the above-entitled action in favor of the above-named plaintiff and against the above-named defendant.

XX.

Said Court erred in giving, making, rendering, entering and filing its final judgment in the above-entitled action in favor of said defendant and against said plaintiff upon the pleadings and record in said action.

XXI.

Said Court erred in giving, making, rendering, entering and filing its final judgment in said action in favor of said defendant and against said plaintiff in this, that said final judgment was and is contrary to law and to the cause made and facts stated in the pleadings and record in said action.

In order that the foregoing assignments of error may appear of record said plaintiff presents the same to said Court, and prays that such disposition be made thereof as is in accordance with law and the Statutes of the United States in such cases made and provided; and said plaintiff herein prays the reversal of the above mentioned final judgment heretofore given, made, rendered, entered and filed in the above-entitled court, in the above-entitled action.

Dated: San Francisco, California, March 23, 1922.

FIRST NATIONAL BANK OF PARK
RAPIDS,

Plaintiff, Plaintiff in Error.

By its Attorneys,

WILLARD P. SMITH.

MARK J. WOOLEY. [44]

United States of America,
Northern District of California,—ss.

We, the undersigned, attorneys for the above-named plaintiff, plaintiff in error herein, do hereby certify that the foregoing assignments of errors is made on behalf of said plaintiff, plaintiff in error herein, and is in our opinion well taken, and the same now constitutes the assignments of error upon the writ prayed for.

Dated: San Francisco, California, this 23d day of March, 1922.

WILLARD P. SMITH,

MARK J. WOOLLEY,

Attorneys for Plaintiff and Plaintiff in Error
Herein.

Receipt of a copy of the within assignment of errors is hereby admitted the 28th day of March, 1922.

ALBERT A. ROSENSHINE,

GOLDMAN, NYE & SURR,

Attorneys for Defendant.

[Endorsed]: Filed Mar. 29, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[45]

(Bond on Writ of Error.)

KNOW ALL MEN BY THESE PRESENTS, That we, First National Bank of Park Rapids as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto R. F. Pray in the full and just sum of Three Hundred and 00/100 Dollars, to be paid to the said R. F. Pray, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of March in the year of our Lord one thousand nine hundred and twenty-two.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division in a suit depending in said Court, between First National Bank of Park Rapids, Plaintiff, vs. R. F. Pray, Defendant, a judgment was rendered against the said First National Bank of Park Rapids and the said First National Bank of Park Rapids having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said R. F. Pray citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said First National Bank of Park Rapids shall prosecute its

said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

FIRST NATIONAL BANK OF PARK
RAPIDS. [Seal]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY. [Seal]

By HENRY V. D. JOHNS,
Attorney-in-fact.

By ERNEST W. SWIVGLEY,
Attorney-in-fact.

(Premium charged for this bond is \$10.00 per annum.) [46]

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Mar. 27, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[47]

(Title of Court and Cause.)

(Praecipe for Record on Writ of Error.)

To the Clerk of said Court:

Sir:—

Please prepare record on writ of error to embrace the following:

1. Third amended complaint.

2. Answer to third amended complaint.
3. Stipulation waiving jury.
4. Minutes of Court on nonsuit.
5. Judgment.
6. Bill of exceptions and order settling bill of exceptions.
7. Assignments of error.
8. Petition for writ of error.
9. Order for writ of error.
10. Writ of error.
11. Order allowing writ of error.
12. Citation on writ of error.
13. Praeceptum.
14. Bond.

WILLARD P. SMITH,
Attorney for Plff. in Error.

[Endorsed]: Filed Apr. 1, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

In the Southern Division of the United States Dis-
trict Court in and for the Northern District of
California, Second Division.

No. 16,519.

THE FIRST NATIONAL BANK OF PARK
RAPIDS,

Plaintiff,

vs.

R. F. PRAY,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing forty-eight (48) pages, numbered from 1 to 48, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the Clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$29.90; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 1st day of April, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [49]

Writ of Error.

UNITED STATES OF AMERICA,—ss.
The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between First National Bank of Park Rapids, plaintiff in error, and R. F. Pray, defendant in error, a manifest error hath happened, to the great damage of the said First National Bank of Park Rapids, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 29th day of March, in the year of our Lord one thousand nine hundred twenty-two.

[Seal]

WALTER B. MALING,

Clerk of the United States District Court for the Northern District of California.

Allowed by:

WM. C. VAN FLEET,
United States District Judge. [50]

Receipt of a copy of the within writ of error is hereby admitted this 30th day of March, 1922.

ALBERT A. ROSENSHINE,
B.

Attorney for Defendant.

[Endorsed]: No. 16,519. United States District Court for the Northern District of California. First National Bank of Park Rapids, Plaintiff in Error, vs. R. F. Pray, Defendant in Error. Writ of Error. Filed Apr. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [51]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States to R. F. Pray,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein First National Bank of Park Rapids is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 29th day of March, A. D. 1922.

WM. C. VAN FLEET,

United States District Judge. [52]

Receipt of a copy of the within citation on writ of error is hereby admitted this 30th day of March, 1922.

ALBERT A. ROSENSHINE,

B.

Attorney for Defendant.

[Endorsed]: No. 16,519. United States District Court for the Northern District of California. First National Bank of Park Rapids, Plaintiff in Error, vs. R. F. Pray, Defendant in Error. Citation on Writ of Error. Filed Apr. 1, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3854. United States Circuit Court of Appeals for the Ninth Circuit. First National Bank of Park Rapids, a Corporation, Plaintiff in Error, vs. R. F. Pray, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed April 1, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

FIRST NATIONAL BANK OF PARK RAPIDS
(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WILLARD P. SMITH,

MARK J. WOOLEY,

Attorneys for Plaintiff in Error.

FILED

MAY 4 - 1922

F. D. MONCKTON,
CLERK

Topical Index

	Page
STATEMENT OF CASE.....	1
SPECIFICATION OF ERRORS RELIED UPON.....	3
DEFENDANT'S LETTERS—	
March 29, 1915.....	3
May 23, 1916.....	6
Nov. 26, 1918.....	10
Dec. 11, 1918.....	11
Aug. 8, 1919.....	13
Sept. 19, 1919.....	16
Oct. 4, 1919.....	17
July 22, 1920.....	19
ARGUMENT	20
Points:	
I. Distinction between acknowledgments made before and after statute had run.....	21
II. Not necessary for defendant to make an express promise to pay.....	22
III. Application of the laws to the facts.....	30
IV. Estoppel	43
CONCLUSION	44

No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS
(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case comes up on writ of error issued to the United States District Court for the Southern Division of the Northern District of California from a judgment entered upon a nonsuit.

The White Stores Company, on March 22, 1915, made its promissory note in writing whereby it promised to pay to the plaintiff in error \$4500 on March 22, 1916, with interest. Defendant in error, by endorsement guaranteed the payment of said note. Plaintiff in error filed suit herein February 24, 1921. More than four years had elapsed prior

to commencing suit, and plaintiff, to overcome the statute of limitations, alleged in his complaint, that defendant had requested plaintiff not to press payment of said note, and had assured plaintiff that an extension would enable defendant to secure from other sources money to apply on the said note, and that plaintiff, in compliance with such request, did not press the payment and extended the maturity of the note until September 19, 1919 (trans. pp. 3 and 4).

For a second cause of action, plaintiff, after setting up the jurisdictional facts and the note, alleges that within four years next preceding the beginning of this action, defendant in writing acknowledged said indebtedness and promised to pay the same (trans. pp. 4-5-6).

Defendant in his answer denies making any requests upon plaintiff not to press the payment of the note, alleges payment, sets up the statute of limitations (Secs. 337 and 339, Code of Civil Procedure of California), and denies that defendant at any time acknowledged said indebtedness or promised to pay the same (trans. pp. 8-13).

The note was offered and received in evidence (trans. p. 19).

Plaintiff thereupon offered in evidence certain letters covering a correspondence between plaintiff and defendant, beginning March 29, 1915, and ending June 26, 1920, for the purpose of showing that defendant had acknowledged the indebtedness in

writing and had also estopped himself by requests for extension and forbearance. All of these letters were ruled out by the trial Court to which rulings plaintiff duly excepted and filed a bill of exceptions and assignments of error. Defendant moved for a nonsuit which was granted. *All but one of the letters were written before the statute of limitations had run against the note.*

Specification of Errors Relied Upon.

The refusal of the Court to admit in evidence certain letters to wit:

Exception No. 1.

“March 29, 1915.

“Mr. W. M. Taber,

“President the First National Bank,

“Park Rapids, Minn.

“Dear Sir: Pursuant to your letter of March 22d, I am sending you herewith my check for \$1500, and also the two notes of the White Stores Co. for \$1500 and \$4500 respectively. The first one named, we understand you are to cancel and keep on file with the other papers concerning this transaction.

“The payment on the \$4500.00 note to be made from time to time as mentioned in a former letter.

“I would appreciate greatly if you could send me maps showing the locations of the various lands

described in the list which you sent me. Also advise me if the taxes are paid and the interest on the mortgages. Also advise me when the other mortgages expire.

"Please let me know all of the above before you transfer the Shore mortgages to me as I may prefer to let the matter stand as it is rather than assume the payment of the other mortgages, Also let me know in a general way whether you think it would be possible to renew the other mortgages providing they become due within a year.

"Thanking you for fixing this matter up for me, I remain,

"Yours very truly,

"R. F. PRAY."

Exception No. 2.

"Park Rapids, Minnesota, October 7th, 1915.

"Mr. R. F. Pray,

"Westwood, Calif.

"Dear Sir: Yours of the 1st inst., to our Mr. Taber is at hand, and in regard to the White Stores' note would say that I understand the conditions under which we are holding this note. Mr. Taber is still at the Rochester Hospital where he has undergone an operation for gall trouble. We expect him back here about the latter part of next week, as he seems to be getting along nicely.

"Yours very respectfully,

"M. C. SCHONEBERGER."

Exception No. 3.

“Park Rapids, Minnesota, February 21, 1916.

“Mr. R. F. Pray,

Westwood, Calif.

“Dear Sir: I have yours of February 16th in reference to the J. Shere matter, and replying will say that the \$17,800 mortgage to Wyman-Partridge is recorded before our mortgage and makes no mention of our mortgage in any way, and unless we could show that they knew about ours it probably would come ahead of the \$6,000 mortgage given to us by Mr. Shere, he told me that this mortgage could be taken up at any time, or that he could make almost any arrangements with them.

“I am writing Mr. Shere to-day concerning this matter and asking him to have it attended to; that is, to have them either release the \$17,800 mortgage and to make a new one, or give us an agreement whereby the \$6000 mortgage would be taken care of before they look to their mortgage. I do not know for sure just what he can do. We are very anxious [34] indeed, to have this matter cleaned up, and of course if you can now arrange to pay the balance of the \$5,000 mortgage, we will assign this mortgage to you, and do our best to get a second mortgage made on the property.

“Yours very respectfully,

“W. M. TABER.”

“I have not been able to get any interest out of Shere. The \$4500 note will be due Mch. 22d and I shall be very glad to have it taken up.”

Exception No. 4.

“Westwood, Cal., May. 23, 1916.

“Mr. W. M. Taber,

“First National Bank,

“Park Rapids, Minn.

“Dear Sir: In reply to your letter of May 18th, I wonder if it would not be possible in some way to have Mr. Shere adjust the mortgage in some way with Wyman-Partridge Co. by cancelling the old one and giving a new one to have the one they give you take precedence over it. It must have been Mr. Shere's intention to have the one they give you filed before the one for Wyman-Partridge. This may seem like an unusual procedure, but Mr. Shere is an unusual man and does things in an unusual manner and I will ask you to take the matter up along this line and see if you cannot get it fixed as I have suggested. What I mean is this: By endorsement J. Shere is responsible for the notes and to escape some of the liability on this, he might be able to make the trade.

“Is there any reason why you could not put in the claim on the notes which the White Stores Co. gave you in the amount of \$6,000 as the matter probably stands that way on their books. Any dividends paid would, therefore, be on the larger amount and it would make it so much less for someone to make up the difference.

“With the good times on the iron range I think the White Stores Co. will pay out much better than intimated in your letter, especially if put under a

competent manager and if we could get the mortgage adjusted as suggested and claim filed for \$6000 instead of \$4500, it would leave the amount to be made up very considerable less than now appears. The \$1500 which I sent you a year ago could be kept as a credit to my personal account if you could handle it in this way. There is certainly no evidence to show that the White Stores Co. took up the \$1500 note.

"I am not in position at this time to take advantage of the offer made in the last paragraph of your letter, but I would still be glad if you could give me the valuation of the land upon which Mr. Shere gave the mortgage, as asked for in a former letter.

"Yours truly,
"R. F. PRAY."

Exception No. 5.

"June 1, 1916.

"Mr. R. F. Pray,
"Westwood, Cal.

"Dear Sir: I have yours of May 23d in reference to the White Store Company's note, and reply will say that I feel very sure that Mr. Sheerer is not able to get the Wyman-Patrich people to release their mortgage. They promised to let me hear from them before June 1st but up to this I have heard nothing from them. On a separate sheet I give you as near as I can the valuation of the lands that we

have in the six thousand dollar (\$6,000) mortgage. I am very anxious, of course, to get this matter cleaned up. I am ready and willing to do anything I can to help you but as you know, of course, when the loan was made, it was made on the stripe of your endorsement and it is really you that we are looking to for our payment and I would appreciate it very much if you would arrange at this time to take the loan up as it is due and we, of course, ought to have our money. If you cannot take it all up at this time I would suggest that you pay us what you can and I will take a new note from you bearing interest at the rate of six per cent and will hold the White Stores notes as collateral security to your note.

"I enclose you, herewith, a few blanks and you can fill them out payable to us in such amounts as you will be able to take care of and return to me and we will do our best to get what we can out of the White Store Company's assets on the strength of the six thousand dollars (\$6000) notes.

"I enclose you a little assignment or statement concerning the fifteen hundred dollars we now have and if satisfactory you can sign and return to me so that I can file a claim for the six thousand dollars (\$6000) and interest.

"I am very sorry, indeed, that this has fallen so heavily on you, but see no other way out of it at the present time.

"Yours truly,

"_____,

"President."

Exception No. 6.

"November 19th, 1918.

"Mr. R. F. Pray,

"Westwood, Cal.

"Dear Sir: We have been hoping we would be able to get something more out of the trustee in the White Stores Company but now have absolutely given up all hopes. We are still holding a loan of \$4500 dated March 23, 1915, and upon which on May 17th, 1918, we received from the trustee \$993.21 which has been endorsed on the note, leaving a balance of \$3506.79 and interest.

"I always feel it is unnecessary to make expense if it can be avoided and at this time am going to make you this proposition, Mr. Pray. You send us one-half of the balance of this note without taking into consideration the interest, that is \$1753.40 and we will cancel your name from the back of the note which entirely releases you. I feel that this is more than meeting you half way and trust we will receive a remittance as above stated by return mail. This holds good only that you do so this month.

"We would be willing to take Liberty bonds if you prefer.

"Yours truly,

"_____,
"Pres."

Exception No. 7.

"Westwood, Cal., November 26, 1918.

"W. M. Taber,

"Pres., First National Bank,

"Park Rapids, Minn.

"Dear Sir: I have received your letter of Nov. 19th in regard to the notes of the White Stores Co. and wish to thank you for the kind manner in which you have referred to them.

"By same mail I also had a letter from the new trustee of the White Stores Co. in regard to final hearing, and have written my attorneys, Courtney & Courtney, for a little further information. I should hear from them in a few days and will then communicate with you.

"With personal regards, I remain,

"Very truly yours,

"R. F. PRAY."

Exception No. 8.

"Dec. 2d, 1918.

"Mr. R. F. Pray,

"Westwood, Calif.

"Dear Sir: I am just in receipt of yours of November 26th and, as stated in my former letter, we will be glad to have you give this due consideration at as early a date as possible and advise us.

"Kindly give up your final answer between now and the 15th of this month.

"With personal regards, I am,

"Very sincerely yours,

"W. M. TABER."

Exception No. 9.

“Westwood, Cal., Dec. 11, 1918.

“Wm. M. Taber,

“Pres., First National Bank,

“Park Rapids, Minn.

“Dear Sir: Referring to your recent correspondence in regard to the White Stores notes. I have just to-day received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee, considerable amount for distribution to the creditors of that company, and the distribution would soon be made.

“When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.

“Very truly yours,

“R. F. PRAY.”

Exception No. 10.

“Park Rapids, Minnesota, Dec. 16th, 1918.

“Mr. R. F. Pray,

“Westwood, Calif.

“My Dear Mr. Pray: I have yours of December 11th in reference to the White Stores Company note and replying will say this. Of course, you realize I am very anxious, indeed, to get this matter cleaned up and off our books.

“If you care to make remittance as per my former letter at this time, I will do this. I will agree

to give you one-half of any further amounts that we receive from trustee. I should think this would be quite satisfactory to you.

"Kindly let me hear from you concerning this and oblige.

"Yours truly,

"W. M. TABER,

"President."

Exception No. 11.

"Park Rapids, Minnesota, 7/31/19.

"Mr. R. F. Pray,

"Westwood, Cal.

"My Dear Sir: The First National Bank of Park Rapids has turned over to me, for adjustment, a note upon which you appear as a guarantor, dated March 22d, 1915, and upon which there remains still due, the sum of \$3506.79 and interest.

"You are of course familiar with the entire matter and there is no necessity for my going into details, except to advise you that the Bank feels that they must do something to protect its interests. I am advised by the Receiver of the White Stores Company that it will be some time before they can close up this matter, as they have sued the Red River Lumber Company and expect to proceed on the double stock-holders liability. However, I am instructed to advise you that to clean this matter up, the Bank will accept the face of the note and will return to you all dividends that they receive in connection with the receivership.

"In the event that you do not see fit to accept this proposition, the Bank have instructed me to sue on the note. This would be distasteful to the Bank, as well as the writer and I trust such course will not be necessary.

"Please let me hear from you at your earliest convenience. With kindest personal regards to yourself and family, I am,

"Very Truly Yours,

"MARK J. WOOLEY."

Exception No. 12.

"Westwood, Calif., Aug. 8, 1919.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"My Dear Mark: I have your letter of July 31st relative to the White Stores note given to the First National Bank, Park Rapids, and bearing my endorsement.

"Last spring Mr. Taber wrote me that the balance of the note was about \$3500.00 and that if we would send one-half of this amount, he would cancel the entire obligation against the White Stores and against me as an endorser. At that time I wrote Mr. Shere and told him about this offer and asked him to pay half of this settlement, and if he did, I would pay the other half and thus wipe this note out. Mr. Shere did not respond to this letter and I have written him again on the subject.

"This whole affair of the White Stores Co. has been a most unfortunate thing for me as I lost

\$20,000.00 thru this investment and never felt I was responsible for it, morally, as I had nothing to do with the management of the stores.

"In addition to this loss I have already sent Mr. Taber \$1500.00 and am very anxious, indeed, to see it cleaned up, as it certainly has been a source of worry and anxiety to me.

"Would you not kindly ascertain Mr. Shere's address and take the matter up with him direct and see if you cannot get half of the amount that Mr. Taber offered to settle for, and I will send the other half and get it out of the way?

"Hoping you will do this for me, I remain,

"Very truly yours,

"R. F. PRAY."

Exception No. 13.

"Park Rapids, Minnesota, 8/29/19.

"Mr. R. F. Pray,

"Westwood, Cal.

"My Dear Mr. Pray: I have a letter from J. Shere dated the 20th inst. in reply to a letter from me written after I had received your letter, in which he advises me that he has written you that he can do nothing at this time." [40]

"I have again taken the matter up with Mr. Taber and he tells me that he wrote you Nov. 19th, 1918, making you the proposition you suggested in your letter, but that same was contingent upon an acceptance during the month of Nov. 1918, and

inasmuch as you did not see fit to accept same, he now advises me that he would not settle on that basis.

"You will understand that I have no discretion in this matter, the Bank simply renews the offer I made you in my former letter and that is contingent upon an early adjustment.

"I cannot help but feel that Shere is not doing the square thing with you, I see him frequently, he is located in the Andrus Building two doors from my father's office and I believe that he is making money, but of course has no tangible assets.

"The Bank looks to you as a responsible party for this money, anything that I could do for you in getting a settlement out of Shere I would be glad to do, but the Bank insists upon a settlement in the immediate future or they will insist upon an action being started to recover the total amount due with interest.

"I appreciate your position in this matter and realize that the whole affair was an unfortunate one, but you realize that banks look at the business, not the human side of questions.

"I shall greatly appreciate an early reply and trust that same will be adjusted without the unpleasantness of having to institute an action.

"Very truly yours,

"MARK J. WOOLLEY."

Exception No. 14.

“Westwood, Calif., Sept. 19, 1919.

“Mr. Mark J. Woolley,

“Park Rapids, Minn.

“Dear Sir: Since our last correspondence, I have tried very hard to get Mr. Shere to pay his half of the remaining portion of the note due the bank at Park Rapids, but without any success whatever.

“Inasmuch as the bank insists upon its legal right to sue the endorsers of the note, for which, however, I do not blame them, I suggest that they go ahead and sue either Mr. Shere or myself, or jointly, and ascertain what the outcome will be.

“Of course, I am very sorry to have this action taken but see no way in which my legal rights may be determined any other way.

“Very truly yours,

“R. F. PRAY.”

Exception No. 15.

“Park Rapids, Minnesota, 9/29/19.

“Mr. R. F. Pray,

“Westwood, Cal.

“Dear Sir: I have your favor of the 19th inst. and note what you say in regard to being unable to secure any kind of a settlement out of J. Shere.

“In case I should be able to secure a note from Mr. Shere running to you, for one-half of the amount due, would you in that case adjust this matter with the Bank?

"If you are interested in this proposition advise me and I will see what I can do. In any event please let me know what you think about same.

"Yours Truly,

"MARK J. WOOLLEY."

Said letter of October 4, 1919, reads as follows:

"Westwood, Calif., Oct. 4, 1919.

"Mr. Mark J. Woolley,

"Park Rapids, Minn.

"Dear Sir: In reply to your letter of Sept. 29th:

"I would not be satisfied to pay half the note with the understanding that Mr. Shere would give his note for the balance, as I am afraid Mr. Shere would not be in a position to pay the note when it became due. I had thought you were proceeding to put this matter in court, so I referred the matter to my attorney out here and he thinks it will be satisfactory, in order to determine just what my liability is, to have suit brot on the note.

"Sorry I cannot see my way on account of the reason given to take up Mr. Shere's proposition.

"Yours truly,

"R. F. PRAY."

Exception No. 16.

"Park Rapids, Minn., June 26th, 1920.

"Mr. R. F. Pray,

"Westwood, Cal.

"My dear Sir: Mr. Taber has just been in to see me again in regard to the notes he holds in which you are interested.

"He has just figured up the total amount, including interest, and the same amounts to about \$5,300 which does not figure all of the interest that is due. However, estimating it upon a basis of \$5,000 Mr. Taber requested that I again write you making you the following proposition:

"That the Bank will accept from you and give you a release from all further liability, the sum of \$2,500, and pay you one-half of any amounts that may be realized from dividends yet to be paid from the trusteeship of the White Stores Company.

"He would rather clean this matter up with you in this way than to be forced to go to the expense and trouble and the incidental unpleasantness of the institution of a law suit. He tells me that of course you were aware of the fact that at the time this money was loaned that he looked to you as the responsible individual in the transaction.

"I trust that you can see your way clear to adjust this matter on this basis and we shall be very glad if you so desire to institute an action in the State of Minnesota to recover from Mr. Shere, who, I think, is probably making some money. But in any event kindly give me a definite answer as to your intention in regard to adjusting this matter so that there will be no question as to what course the Bank must pursue.

"Very truly yours,

"MARK J. WOOLLEY."

Said letter of July 22d, 1920, reads as follows:

“Westwood, Calif., July 22, 1920.

“Mr. Mark J. Woolley,

“Park Rapids, Minn.

“My Dear Mr. Woolley:

“Since receiving your letter of June 26th in regard to the White Stores notes, which I endorsed, I have consulted with my attorneys here and they advise me to let the matter go to suit, as in that way my legal rights will be fully protected in the matter.

“I appreciate very much the lenient manner in which Mr. Taber has treated this matter, and am sorry I will not be in position to take advantage of his kindness. I think possibly the best for all concerned will be to let the matter go to trial.

“Hoping you are enjoying the best of good luck in your practice and in your business, I remain,

“Yours truly,

“R. F. PRAY.”

Exception No. 17.

Said Court erred in granting a nonsuit to defendant as set forth in plaintiff's bill of exceptions, Exception No. 17 plaintiff then and there duly excepted.

Argument.

PLAINTIFF IN ERROR CLAIMS THAT THE LETTERS SHOULD HAVE BEEN RECEIVED IN EVIDENCE AS WRITTEN ACKNOWLEDGMENTS OF THE INDEBTEDNESS.

The law in regard to acknowledgments sufficient to take a case out of the operation of the statute of limitations is found in Sec. 360 of the Code of Civil Procedure of California, which reads as follows:

“No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.”

Federal Courts are governed by the rulings of the State Courts in the interpretation of state statutes. This rule is very clearly laid down by Morrow, J., in *Bullion v. Hegler*, 93 Fed. 890, where he says at p. 892:

“For the determination of the question at issue in this case, we must therefore look to the decisions of the Supreme Court of California”, citing *Bauserman v. Hunt*, 147 U. S. 647; *Metcalf v. Watertown*, 153 U. S. 671; *Campbell v. Haverhill*, 155 U. S. 610.

We shall therefore confine our argument to the California cases on the question of what constitutes a sufficient acknowledgment to take the case out of the statute.

POINT I.

DISTINCTION BETWEEN AN ACKNOWLEDGMENT MADE BEFORE THE CLAIM HAD OUTLAWED AND ONE MADE AFTER THE STATUTE HAD RUN. THE LETTERS WHICH WE OFFERED WERE, WITH ONE EXCEPTION, ALL WRITTEN BEFORE THE STATUTE HAD RUN.

There is a well recognized difference between an acknowledgment which continues an obligation and one which revives it. In the former case it can be continued by an acknowledgment but after it has lapsed it must be revived by a new promise. While there is some confusion in the cases on this subject, we think it has arisen from not carefully bearing this distinction in mind.

In *Powell v. Patch*, 166 Cal. 329, a note had outlawed and debtor wrote "What is the state of my indebtedness to you regarding the lot you bought? The money I advanced to N. was intended to offset it, but let me know the condition". This was held not sufficient acknowledgment to take the indebtedness out of the statute. The Court said at p. 331:

"It was written *after the bar of the statute had attached* and must be viewed in the light of that fact, for there is a *great difference* to be put upon the construction of a letter written *before* and one prepared *after* the running of the statute."

In *So. Pac. v. Prosser*, 122 Cal. 413 at p. 415, the Court said:

"There is a great difference between the construction to be put on a letter written a short time after the debt has been contracted and one written after the debt is already barred".

We desire to point out clearly to this Court this distinction because it was due to our inability to properly elucidate this point that this case is in this Court. Our contention on the trial was, that the acknowledgment here having been made while the indebtedness was still existing, the debt had been continued and no express promise was necessary to revive it. While the Court below held that an express promise to pay must be shown and further held that our letters failed to contain any such express promise and that therefore we had failed to make out a case.

II.

IT WAS NOT NECESSARY FOR THE PLAINTIFF IN ERROR TO SHOW THAT DEFENDANT HAD MADE AN EXPRESS PROMISE TO PAY THE NOTE.

In *So. Pac. v. Prosser*, 122 Cal. 413, the debtor wrote:

“Dear Sir: Referring to the traction engine at Auburn owned by me and mortgaged to the S. P. Co., I have not been able to sell it—now sir, can’t you give me a chance to pay you in work? The company employs many men, and if you choose, you can procure some employment for me. I have a sick family and am hard up personally and need work and want to pay you besides W. S. Prosser.”

This was held to be a sufficient acknowledgment. At p. 415 the Court said:

“The distinct and unqualified admission of an existing debt—contained in a writing signed

by the party to be charged and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract and to interrupt the running of the Statute of Limitations against the same. From such an acknowledgment, the law implies a promise to pay."

We will point out later that defendant admitted the existence of the debt and never made any intimation of any intent to refuse payment. Defendant wrote eight letters to plaintiff in reference to this note and there isn't a single letter in which there is an expression of an intention not to pay. How could he write eight letters on this subject without its constituting an acknowledgment? It would certainly have to be very diplomatic writing to so conceal the main thought that was in the mind of both plaintiff and defendant. Plaintiff keeps writing for the money and eight times defendant replies with some request for delay.

In *Concannon v. Smith*, 134 Cal. 14, at p. 20:

"The statute does not prescribe any form in which the acknowledgment or promise shall be made. Whether these writings constitute a sufficient acknowledgment or promise is therefore a question of law. The important thing is, that it shall be contained in some writing signed by the party to be charged thereby. The expression 'contained in some writing' clearly indicates that it is not essential that the acknowledgment or promise should be formed such as 'I hereby acknowledge' or 'hereby promise'. It is sufficient if it shows that the writer regards or treats the indebtedness as subsisting, and from this acknowledgment the law implies a promise to pay and for which

promise the old debt is a sufficient consideration."

This doctrine was approved in *Moore v. Gould*, 151 Cal. 723, at p. 727, the Court said:

"Each of these instruments constituted a renewal of the note and mortgage—furthermore, each of them contained an acknowledgment of the debt and thus operated to start a new period of limitation."

McCormick v. Nofziger, 10 Cal. App. 241, at p. 44.

In *Tuggler v. Miner*, 76 Cal. 98, a note was endorsed

"6/10/79 on my return from New York I will settle the above a/c"; "4/10/81. This agreement renewed this day",

and the Court held that the writing took it out of the statute and further held that "settle" meant to pay.

In *Minifie v. Rowley*, 202 Pac. 673 (Cal. Sup.) (1922), action on a promissory note—matured January 4, 1910. On January 6, 1914, Rowley Co. made payment of interest accompanied by a letter reading:

"San Francisco, Cal.
January 6, 1914.

Jones & Given,
8th Floor Crocker Bldg.,
San Francisco, Cal.
Gentlemen:

Herewith check 8889 amount \$100 in payment 3 months interest due you on \$10,000 loan. That is to say—interest from Oct. 3, 1913 to Jan. 3, 1914.

Very truly yours,
The Rowley Investment Co., Inc."

This was held to be a sufficient acknowledgment to take it out of the statute. At page 675, the court said:

“However it is unnecessary for the letter itself to amount to a written promise or acknowledgment of the debt due.”

“The payment made and entered upon the open book account tolls the statute.”

Furlow v. Balboa, 62 Cal. Dec. 290 (1921).

In Curtis v. Holee, 61 Cal. Dec. 123 (1921); 195 Pac. 395, foreclosure of a mortgage—the court held that an extension agreement endorsed on note (secured by mortgage) constituted an acknowledgment of the mortgage and debt secured thereby:

Lennon, J., said: “If the grantee acknowledges the existence of the debt in writing with sufficient certainty, that is, sufficient to take the debt out of the operation of the statute, *an actual promise to pay is not necessary.*”

“A writing signed by the party to be charged, containing an acknowledgment of the existence of the indebtedness is sufficient to take such indebtedness out of the statute.” Bledsoe, J.

In re Blankenship, 220 F. 395.

Union Oil Co. v. Purissima H. Oil Co., 181 Cal. 479-480 (1919).

It will be noted that the foregoing cases are very recent decisions of the Supreme Court and that they seem to extend the doctrine. Minifie v. Rowley, decided in January, 1922, holds that the acknowledgment may be by conduct as well as words.

Furlow v. Balboa, decided in 1921, held that the mere entry of payment upon the open book account tolled the statute.

Curtis v. Holee, decided in 1921, holds that an extension agreement endorsed on the note takes the mortgage out of the statute. All of these recent cases hold that an express promise to pay is not necessary.

In *Foster v. Bowles*, 138 Cal. 346, at p. 351, the Court said:

“The trust deed declared, ‘And whereas there is now existing a mortgage for the sum of \$20,000 against said tract hereinbefore described’ and provided for payments on account of this mortgage and thus expressly acknowledged the existence of the indebtedness as well as of the mortgage. Indeed any acknowledgment of the mortgage was an acknowledgment of the indebtedness secured thereby. It was not necessary that the respondents should promise to pay the indebtedness in order to establish a new date for the statute to begin running as to the mortgage. All that was required was a plain and distinct acknowledgment in writing of the existence of the mortgage.”

Foster v. Bowles, 138 Cal. 346, at p. 351, was approved in *Worth v. Worth*, 155 Cal. 599, at p. 602—there plaintiff’s attorney shortly before a mortgage was about to outlaw wrote to defendant calling his attention to that fact and asked for a renewal or payment to which defendant replied:

“In response to the mortgage referred to in yours of recent date. I see no necessity of making a new mortgage. An agreement extending the old mortgage will have the same

effect, won't it? However if you must have a new mortgage, will make it. Nothing ever out-laws with me. Truly yours, C. Worth."

At page 602 the Court said:

"Counsel for defendant have not pointed out why this was not a sufficient acknowledgment in writing to take the case out of the operation of the statute of limitations and we can conceive of no reason why it did not have such effect."

"The promise referred to is not necessarily a promise to pay the debt. A promise not to plead the statute comes equally within the language used and will equally operate to prevent the bar of the statute."

State Loan v. Cochrane, 130 Cal. 245, at p. 251.

In Chaffee v. Brown, 109 Cal. 211, where the mortgagors signed with the mortgagees an instrument releasing from the mortgage a part of the incumbered property and referring therein to the indebtedness secured by the mortgage, such instrument constituted an acknowledgment of the indebtedness by which the running of the statute of limitations upon the indebtedness was interrupted.

"Nor do we think that the plea of the statute of limitations was sustained; the action was begun July 12, 1893, and as late as the month of March previous the appellants had signed with the plaintiffs, the instrument releasing from the mortgage a part of the incumbered property; such instrument referred to the alleged indebtedness in such terms as, fairly considered, constitutes an acknowledgment thereof. The running of the statute was thus interrupted."

This was approved in *McDonald v. Randall*, 139 Cal. 246, at p. 252.

In *Fielding v. Iler*, 39 Cal. App. 559 (1919), a letter written to the mortgagee two days before the expiration of the statutory period acknowledging the existence of the indebtedness was sufficient to toll the statute although the letter contained no promise to pay it.

In the case of *Minifie v. Rowley*, 202 Pac. 673, at p. 675, the Court held that:

“There may be an acknowledgment by conduct, as well as by words. In the case of part payment for instance, of either principal or interest, the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal act of a subsisting contract or liability from which a new contract to pay the debt must be inferred.”

So here we find a considerable correspondence from plaintiff calling for payment and defendant asking for consideration and delay but never repudiating the obligation. There was surely here an “acknowledgment by conduct” as much so as in *Minifie v. Rowley*.

“Each check [letter] was an acknowledgment of something. But of what? The answer is, of \$45 as interest.”

Clunin v. First Fed. Trust Co., 35 Cal. App. Dec. 746, at p. 747.

“It is not essential that the acknowledgment or promise should be formal but it is sufficient if the writer regards or treats the contract as

subsisting, from which a promise may be implied.”

Cotcher v. Barton, 33 Cal. App. Dec. 141, at p. 144 (1920).

In the *Auzerias v. Naglee*, 74 Cal. 60, at p. 68, the court said:

“Defendant paid to the plaintiff on the account rendered him the sum of \$1000 which is evident by the receipt on the back of the account in the handwriting of the defendant (except the signature thereto) as follows: Received December 8th, 1880, of H. Naglee, \$1000 in account of the within E. Auzerias Ldg. partner.”

This was held to be a sufficient acknowledgment.

It would seem from a consideration of the foregoing cases that a promise to pay was not necessary. By that we mean an express promise to pay. However, from the acknowledgment, the law implies a promise to pay and that is the only promise that is necessary.

In *Biddell v. Brizzolari*, 56 Cal. 374, at 380, the Court said:

“The point to be resolved in all cases is, whether the acknowledgment or promise is a mere continuation of the original promise grounded upon presumption of payment or whether it is a new contract springing out of and supported by the original consideration. We think that Sec. 360 of the C. C. P. does not establish a different rule in this state. The purpose of that section is to establish a rule, not with respect to the character of the promise

or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved.”

The Court held that the agreement made by a third party to pay the mortgage did not revive it as to defendant.

III.

APPLYING THE LAW WHICH WE HAVE SET FORTH IN THE FOREGOING TO THE FACTS IN THIS CASE, AN EXPRESS PROMISE TO PAY WAS UNNECESSARY AS DEFENDANT SUFFICIENTLY ACKNOWLEDGED THE DEBT TO TOLL THE STATUTE.

A correspondence, between plaintiff and defendant, covering this note *and nothing else as there was no other indebtedness* (trans. p. 42), began March 29, 1915, and extended to July 22, 1920. The note matured March 22, 1916 (trans. p. 19). This action was commenced February 24, 1921. In the letter of March 29, 1915, defendant speaks of “the payment on this \$4500 note to be made from time to time”. As the note itself accompanied the letter it would seem that defendant expected some indulgence (trans. p. 46).

In the letter of May 23, 1916 (trans. p. 46, Exception No. 4 he says:

“If we could get the mortgage adjusted as suggested etc., it would leave the amount to be made up [by me] very considerably less than now appears.”

It appears that defendant expected to have the liability lessened by dividends from the trustees in bankruptcy of the White Stores Company and that subsequently on May 15, 1918, a dividend of \$993.21 was so paid (trans. p. 6).

In defendant's letter of November 26, 1918 (trans. p. 53, Exception 7) he says:

"I have received your letter of Nov. 19th in regard to the notes of the White Stores Co. etc. I should hear from my attorneys in a few days and will then communicate with you. R. F. Pray."

This was in reply to a request to pay this \$4500 note and in fact an acknowledgment of it.

In defendant's letter of December 11, 1918 (trans. p. 54, Exception No. 9) he says:

"Westwood, Cal., Dec. 11, 1918.

"Wm. M. Taber,

"Pres., First National Bank,

"Park Rapids, Minn.

"Dear Sir: Referring to your recent correspondence in regard to the White Stores notes. I have just today received a letter from Courtney & Courtney, attorneys at Duluth, saying that there was in the hands of trustee, considerable amount for distribution to the creditors of that company, and the distribution would soon be made.

"When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.

"Very truly yours,
"R. F. Pray."

This is surely an acknowledgment of the indebtedness without any indication that he would not pay it or without any condition attached. It will be noted that there is no denial of the indebtedness in any of the letters.

Where a surety on a note in response to demands for payment wrote that the bankruptcy case of one of the principals had not yet been settled and for him to get all he could out of him, and that he, the surety, would be home in two weeks and then see the payee, it was held sufficient to take the note out of the statute.

Woodsville Bank v. Ricker, 82 Atl. 2 (Vt.).

If these two letters of November 26, 1918, and December 11, 1918, do not constitute an acknowledgment of the debt it is difficult to see what they mean. Defendant is called upon by plaintiff to pay the note and he writes, "I have received your letter in regard to the notes of the White Stores Co.—I also have a letter from the trustee [in bankruptcy] and have written my attorneys for a little further information", and concludes "I should hear from them in a few days and will then communicate with you". Here, again, there is no repudiation, no conditional offer, nor any express promise, but as we have shown, no express promise is necessary. He could not have written that letter in response to a demand for payment without making a complete acknowledgment. There can be no middle ground. These letters are either an acknowledgment or a repudiation of the debt. We fail to see where there

is any attempt on the part of the defendant to repudiate the debt. He repeatedly refers to the note and concludes "I will then communicate with you". This is a response to a demand for payment. After getting further information regarding the probabilities of dividends from the trustee in bankruptcy I will communicate with you. I cannot tell now just how much I shall have to pay because it is uncertain how much will be paid out in bankruptcy but when I can find out what the bankruptcy dividends will reduce the debt to then I will take up with you the payment of the note. That is what he meant. It was a complete and unequivocal acknowledgment of the debt. He didn't say "I don't owe it. I won't pay it." But he asks for time and for what purpose? Merely to find out whether or not the assets of the principal (he being a surety), which were being administered in the bankruptcy court would not realize enough to relieve him from a portion of his responsibility.

Now, looking at defendant's letter of December 11, 1918 (trans. pp. 54 and 55): "Referring to your recent correspondence in regard to the White Store notes" (which he had been asked to pay) there is a "considerable amount for distribution to the creditors of that company and the distribution will soon be made". (\$993.00 had been distributed seven months before (trans. p. 6). "When this is done (distribution by trustee in bankruptcy) I should be very glad to hear from you again. Please understand I do not wish to stall this matter off but be-

lieve it only proper to apply the distribution which you receive on these notes before making settlement. R. F. Pray". What does he mean? I am anxious to have the principal pay this note or a part of it. As soon as I can find out what my part is I will settle with you for the balance. Since he wishes the matter delayed until the assets of the principal are distributed in bankruptcy *before making settlement*, does this not imply that after distribution is made, or after he has learned what the distribution will be, he will *make* settlement? If a creditor demands payment of a debt and the debtor says wait until a certain event happens and I will then make settlement, can this mean anything else other than that the debtor will pay? Making settlement means nothing else than paying. He did not insist that he will not pay until distribution is made but said he "*believes it only proper* to apply the distribution before making settlement". Is this all mere talk with no meaning? What is he talking about? What is the occasion for his writing these letters? The creditor is demanding payment and the debtor is asking his indulgence—*not repudiating* the obligation. As we have pointed out, the debtor cannot very well talk or write about the obligation without either acknowledging it or repudiating it. What third ground could he stand on? He surely does not convey the impression that he repudiates it. He writes about "making settlement". That surely does not mean repudiation. There is no conditional offer. He does not say "I will pay a certain amount on certain conditions", but he does say, "wait until I get certain

information". "I do not wish to stall the matter off but believe it is only proper to apply the distribution first". He doesn't say that he will not pay until distribution is made, and now when his creditor has indulged him, it comes with ill grace from him to say that the request for indulgence was not an acknowledgment. It would not require any considerable stretch of the imagination to interpret his statement that "before making settlement" he would like to ascertain the amount of dividends available to mean that after he had found out what that disbursement would amount to that then he would "settle". And as we have pointed out, the word "settle" under such circumstances cannot mean anything else but "pay". The Supreme Court so interpreted the word "settle" in *Tuggler v. Miner*, 76 Cal. 98, so that we have then a promise to pay. The fact as to what would be disbursed was easily ascertainable and it could not be reasonably expected that debtor could or would try to postpone settlement indefinitely but was merely seeking a reasonable postponement in order to obtain this information.

Quite a similar acknowledgment is found in the case of *Winchell v. Hicks*, 18 N. Y. 558. There one Bowman had the money and was the principal for whom the other defendants were sureties. Before the statute had run, the plaintiff called on Hicks, one of the sureties, who directed him to get it out of Bowman, the principal. The Court said at page 563:

"Did he not substantially acknowledge the debt, and direct the same request to be made to

Bowman to pay the interest as did his co-surety? Was not his declaration a sufficient recognition to bind him? You must get it out of Bowman, in other words, 'I am a surety only, and tho liable and willing to pay, if the principal fails so to do, I wish you to request him to pay it and if he refuses or fails, you can call on me again.' Let it be remembered that this declaration or request was made at a time when the note could have been collected of him by legal process, and when a resort to such process would undoubtedly have been made if he had repudiated or refused absolutely to pay or to recognize his liability upon it. But so far from evincing any such intention, he requests, or assents at least, that the agent should call upon Bowman and receive a payment which was for his own benefit, and which, most probably, prevented the prosecution of a suit for its recovery, in which an answer of the statute could not have availed him, could his design have been otherwise than to renew the note, and thus prolong his own liability in the hope that Bowman would eventually pay the whole debt?—neither Hicks nor Tanner should now be permitted to take advantage of a delay which was occasioned by their own acts and declarations, and which was granted for their sole benefit and accomodation. They requested that Bowman should do what was obligatory upon them, and his act in compliance with that request was as much their act as if they had stood by and made the request personally."

So here defendant, at a time when if he had repudiated the obligation it could have been collected from him, requested that the money should be collected from the estate of the principal and thereby secured an extension beyond the period of

the statute. He was willing to have his own liability prolonged in the hope that the dividends from the trustee in bankruptcy of the White Stores would wipe out his obligation. By the request that he made, he acknowledged the obligation and prevented plaintiff from pursuing him personally at a time when he could have been made to pay it. Should he be permitted to take advantage of a delay which was occasioned by his own acts and which was granted for his sole benefit? To permit him so to do would be an injustice.

In defendant's letter of August 8, 1919 (trans. p. 57, Exception No. 12) he writes:

"I have your letter of July 31, relative to the White Stores note given to the First National Bank of Park Rapids and bearing my endorsement—am very anxious to see it cleared up—see if you can get $\frac{1}{2}$ from Mr. Shere [the other indorser] and I will send the other half and get it out of the way. R. F. Pray."

This was a clear acknowledgment of the debt as he refers to the "*note given to the First National Bank of Park Rapids and bearing my endorsement*". Nothing could be clearer than that and he follows "am very anxious to see it cleared up".

"When payment was demanded of defendant who said, 'I supposed it was paid by White by an arrangement, tell your father to put White up to pay it, if he does not I shall have to pay it'".

Hayden v. Johnson, 26 Vt. 768.

This was held sufficient to take the debt out of the statute.

It is not necessary that he state the amount and date of the note. It was sufficiently identified as there was no other indebtedness (trans. p. 42).

“Where the debt is certain and liquidated nothing need be said in the acknowledgment as to its amount. Words wholly insufficient when applied to an unsettled account may have a different signification as to a debt reduced to a certainty.”

1 Wood on Limitation, p. 375 (4th Ed.).

In defendant's letter of September 19, 1919 (trans. p. 60, Exception No. 14) he speaks “of the note due the bank at Park Rapids” and suggests “that they go ahead and sue either Mr. Shere (the other endorser) or myself or jointly and ascertain what the outcome will be”. He does not say that he will not pay or that he will contest any suit. It might very well be that he would want a judgment obtained on the note so that when he paid it he could hold Shere on the judgment.

“Any acknowledgment of the existence of an outstanding debt, where there are no circumstances indicating a purpose not to pay it, is sufficient to raise a new promise and remove the statute bar.”

1 Wood on Limitation, p. 376, p. 388.

In defendant's letter of October 4, 1919 (trans. p. 62, Exception No. 15) he again speaks of the note and asks that suit be brought” in order to determine just what my liability is”. This is again an acknowledgment. He does not deny the existence of the note nor does he deny liability.

The note matured March 22, 1916, and the four year limitation of the statute expired March 22, 1920.

C. C. P., Sec. 337.

In defendant's letter of July 22, 1920 (trans. p. 64, Exception No. 16) he says "Since receiving your letter of June 26 in regard to the White Store notes which I endorsed"—and follows "my attorneys here have advised me to let the matter go to suit as in that way my legal rights will be fully protected in the matter".

In *Baillie v. Sibbald*, 15 Ves. 185, a plea of the statute was overruled upon letters from the defendant to the plaintiff assigning reasons for declining to pay, and recommending the plaintiff to bring an action, which was considered as amounting to an acknowledging of the debt sufficiently to take the case out of the statute.

Wood on Limitation (4th Ed.), Sec. 64 says:

"1st. The acknowledgment must be in terms sufficient to warrant the inference of a promise to pay the debt.

2nd. It must be made to the proper person.

3rd. It must be made by the proper person.

4th. It must be made with the proper formalities where they are required by statute."

We have shown,

1st. That the acknowledgment here was in terms sufficient to warrant the inference of a promise to pay the note.

2nd. That it was made to plaintiff.

3rd. That it was made by defendant.

4th. That it was made in writing in conformity with the requirements of the statute.

“It is not necessary that the writing should expressly admit that the debt is unpaid but it is enough if it clearly and unequivocally refers to the note.”

Will v. Marker, 98 N. W. 487 (Iowa).

“An admission fairly deducible from the conduct of the debtor that there is a sum due which he is liable and willing to pay is sufficient.”

25 Cyc. 1338;

Woodbury v. Woodbury, 90 Am. Dec. 555 (N. H.);

Bean v. Wheatley, 13 App. Cas. D. C. 473.

It has been held that a clear and express acknowledgment of the debt will be sufficient to toll the statute even though it is accompanied by a refusal to pay the debt.

Elder v. Dyer, 40 Am. Rep. 320 (Kan.);

Murray v. Coster, 11 Am. Dec. 333 (N. Y.);

Lee v. Perry, 15 Am. Dec. 650 (S. C.); 102 Am. St. Rep. 767, note.

In the letter of Aug. 8, 1919, defendant asks plaintiff to get $\frac{1}{2}$ from Shere, the other indorser. He doesn't say that he will not pay unless Shere pays $\frac{1}{2}$. This letter in connection with the others shows a definite acknowledgment. The suggestion that Shere be asked to pay $\frac{1}{2}$ comes at the end of the

letter in a separate paragraph. If this letter stood by itself and was the only letter written by defendant it might not be held sufficient but in connection with the whole correspondence it certainly shows an acknowledgment. And the suggestion to get Shere to pay $\frac{1}{2}$ comes at the end of a long letter in which he first acknowledges the debt and then goes on to say that he has lost considerable money in the White Stores matter and finally to end the letter makes the suggestion that $\frac{1}{2}$ be gotten from Shere. This suggestion is entirely disconnected from the rest of the letter and the acknowledgment is not made in connection with the suggestion but entirely apart from it.

“When the promise is evidenced by letters, all of the letters relating to the debt, although they are separated by a considerable period of time, may be taken into consideration in determining whether a new promise was made.”

25 Cyc., 1353.

“We are unable to see why all these letters may not be looked to, and if in any of them, or all of them, there is sufficient language from which a clear unqualified promise to pay the debt may be found, such promise could be given effect, and the appellant be bound thereby, as all of the letters were the writings of the appellant.”

Walker v. Freeman, 70 N. E. 595, at p. 598 (Ill.).

So here, if the letters are looked to, it will be seen that the correspondence referred to this note and to means of paying it and nowhere can there

be found a repudiation of any liability. Defendant repeatedly admitted his liability and the law, from that, implies a promise to pay.

The following are some examples of what have been held to be sufficient acknowledgments.

“I am ashamed the account has stood so long.”

Comforth v. Smithard, 5 H. & N. 13.

“I hope to be in Hampshire very soon and I trust every thing will be arranged with W (the creditor) agreeable to her wishes.”

Edwards v. Goater, 15 Beav. 415.

“Defendant said the note ‘That he had signed the same with his son and that in the end he thought he should have to pay’.”

Phelps v. Wuson, 26 Vt. 30.

“I expect to have my father’s property turned over to me in a few days but it has not come yet—just as soon as I can get it I intend to settle with your father. I am very sorry that I am unable to do so now. (Signed) A. C. Saunders.” Held to be sufficient acknowledgment.

Mowry v. Saunders Ann. Cas., 1913 A. 1348 (R. I.).

“Letters written by a debtor to his creditor, acknowledging an indebtedness but declaring his inability to pay are sufficient to overcome the statute.”

Bloom v. Kern, 30 La. Ann. 1263.

“There is required either an express promise to pay the debt or an absolute admission of indebtedness from which a promise to pay may naturally be inferred”—“A clear admission of

the debt being evidence, if un rebutted, of a new promise to pay sufficient to avoid the statute."

Wood on Limitation, Sec. 68.

IV.

**DEFENDANT BY HIS CONDUCT AS SHOWN BY HIS LETTERS IS
ESTOPPED FROM SETTING UP THE STATUTE OF LIMITA-
TIONS.**

Phillips v. Phillips, 163 Cal. 53;
Quanchi v. Ben Lomand Wine Co., 17 Cal.
App. 565;
State Loan v. Cochrane, 139 Cal. 245;
Daniel v. Daniel, 3 Cal. App. 294;
Smith v. Lawrence, 38 Cal. 24;
Randon v. Toby, 11 How. 493;
Smith v. Dupree, 140 S. W. 367 (Texas);
Pollak v. Billings, 32 So. 639;
Wells Fargo v. Enright, 127 Cal. 669;
17 Rul. Cas. Law, p. 884;
Schroeder v. Young, 161 U. S. 334 at p. 344;
Missouri K. & T. v. Pratt, 85 Pac. 141;
25 Cyc. 1016.

As we pointed out these requests for indulgence were made at a time when the statute would not have availed defendant had he been sued. The delay was had at his request. Had he repudiated all liability suit would have been brought but he kept asking for time without repudiating his liability and in that way prevented plaintiff from acting when he could and would, had it not been for defendants repeated

requests for delay. He should not be allowed to plead the statute under such circumstances.

“Aside from the estoppel arising out of an express waiver of the defense of the statute or of the promise not to plead it, the defendant may be estopped to avail himself of the statute by his conduct, where such conduct, though not amounting to a distinct waiver, and though not constituting such fraud as will work a postponement of the statute under the general rule of fraud and concealment has yet been such as directly to lead the plaintiff to delay bringing suit until the statutory period has elapsed. In such cases the equity rule that no man may take advantage of his own wrong may be invoked to preclude the defendant from availing himself of the defense of the statute.”

19 Am. & Eng. 2nd Ed. 288.

CONCLUSION.

Defendant was a surety on the note. Prior to the tolling of the statute he wrote seven letters to plaintiff in response to demands for the payment of the note. In no one of those letters is there contained any repudiation of the obligation. In each of them he acknowledges the debt. He was endeavoring to obtain sufficient dividends from the bankrupt estate of the principal to wipe out his obligation and repeatedly wrote that he was awaiting information regarding disbursements by the trustee. These requests for delay were made at a time, before the statute had tolled, and when he could have been forced to pay. The delay was oc-

casioned at his request for his benefit. If he at any time had repudiated the obligation plaintiff could have proceeded at once to enforce it. The course of the correspondence shows that he was continually reminded of the fact that the debt was overdue and that he did not deny this but sought for time. All of which raised an implied promise to pay.

In addition to the several acknowledgments of the debt his conduct was such that he was estopped from setting up the statute of limitations.

The judgment for defendant should be reversed.

Dated, San Francisco,

May 1, 1922.

Respectfully submitted,

WILLARD P. SMITH,

MARK J. WOOLEY,

Attorneys for Plaintiff in Error.

No. 3854

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

3

FIRST NATIONAL BANK OF PARK RAPIDS
(a corporation),

Plaintiff in Error,

vs.

R. F. PRAY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

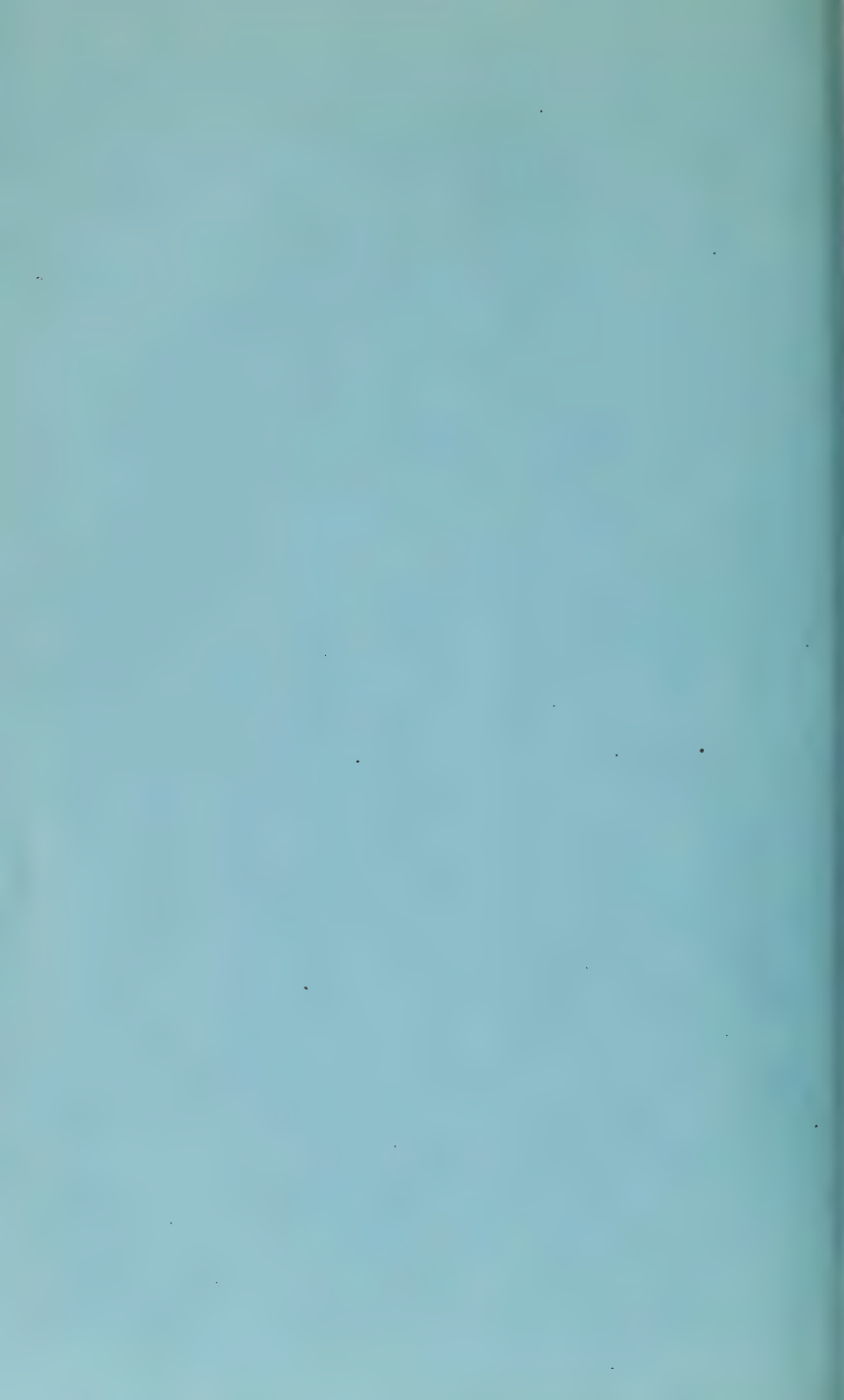
ALBERT A. ROSENSHINE,
GOLDMAN, NYE & Surr,
Attorneys for Defendant in Error.

FILED

MAY 12 1922

F. D. MONKTON,

CLERK



Topical Index

	Page
INTRODUCTORY.....	1
STATEMENT OF FACTS.....	2
POINTS.....	3
Point I —Extension of date of maturity of note....	5
Point II —Extension of statutory period.....	6
Point III—Estoppel.....	7
Point IV—Acknowledgment and promise.....	9
<i>Postulate</i> Illustrating what will not suffice.....	11
Review of the letters.....	20
Pith of the correspondence.....	23
Analysis of plaintiff's citations as to acknowledg- ments.....	26
CONCLUSION.....	33

Table of Cases Cited

	Pages
<i>Act of Feb. 26, 1919</i> , ch. 48, 40 Stat. L. 1181.....	2
<i>Auzerais v. Naglee</i> , 74 Cal. 67.....	28, 32
<i>Barnhart v. Fulkerth</i> , 93 Cal. 497.....	7
<i>Barron v. Kennedy</i> , 17 Cal. 574.....	26
<i>Biddel v. Brizzolara</i> , 56 Cal. 382.....	12, 13
<i>Bullion & Exchange Bk. v. Hegler</i> , 93 Fed. 890.....	11, 13, 33
<i>C. C. P.</i> , Section 360.....	5
<i>C. C. P.</i> , Section 337.....	3, 4
<i>Chaffee v. Brown</i> , 109 Cal. 211.....	31
<i>Clunin v. First Federal Trust Co.</i> , 35 C. A. D. 746....	31
<i>Cotcher v. Barton</i> , 33 C. A. D. 144.....	32
<i>Concannon v. Smith</i> , 134 Cal. 20.....	26
<i>Curtis v. City of Sacramento</i> , 70 Cal. 412....	10, 11, 12, 13, 20
<i>Curtis v. Holee</i> , 195 Pac. 397.....	29
<i>Eltinge v. Santos</i> , 152 Pac. 918; 171 Cal. 278.....	8
<i>Foster v. Bowles</i> , 138 Cal. 350.....	30
<i>Furlow Pressed Brick Co. v. Balboa Land & Water Co.</i> , 200 Pac. 629, 62 C. D. 290.....	13, 30
<i>Lilly-Brackett Co. v. Sonnemann</i> , 157 Cal. 196.....	11
<i>McCormick v. Brown</i> , 36 Cal. 180.....	12, 13
<i>McCormick v. Nofziger</i> , 10 Cal. App. 241.....	27
<i>Mentry v. Broadway Bank etc.</i> , 129 Pac. 472; 20 Cal. App. 388	8
<i>Mintzer v. The City of Richmond</i> , 27 Cal. Appeals 566..	2
<i>Minifie v. Rowley</i> , 202 Pac. 673.....	28
<i>Morehouse v. Morehouse</i> , 69 Pac. 625-627; 6 Cal. Un. 966	17
<i>Moore v. Gould</i> , 151 Cal. 723.....	27
<i>Nixon v. Ramsey</i> , 180 Pac. 649-650; 40 Cal. App. 240....	17
<i>Outwaters v. Brownlee</i> , 135 Pac. 301; 22 Cal. App. 535..	13, 18

TABLE OF CASES CITED

iii

	Pages
<i>Pac. Improvt. Co. v. Maxwell</i> , 146 Pac. 902, 26 Cal. App. 265	9
<i>Pierce v. Merrill</i> , 128 Cal. 476.....	12, 18
<i>Powell v. Petch</i> , 166 Cal. 329; 136 p. 56.....	12, 15, 18
<i>Quanchi v. Ben Lomond Wine Co.</i> , 120 Pac. 428, 17 Cal. App. 565	9
<i>Rodgers v. Byers</i> , 127 Cal. 528.....	12, 13, 19
<i>Shadburne v. Daly</i> , 76 Cal. 355.....	8
<i>Sherwood v. Lowell</i> , 167 Pac. 554; 34 Cal. App. 365....	17
<i>Smith v. Compton</i> , 6 Cal. 24.....	8
<i>Southern Pacific Co. v. Prosser</i> , 122 Cal. 413.....	26
<i>St. Paul Title & Trust v. Stensgaard</i> , 121 Pac. 731; 162 Cal. 178	11
<i>Snyder v. Dederichs</i> , 179 Pac. 535; 39 Cal. App. 628..	12, 17
<i>Textile Nat'l Bank v. Lawrence</i> , 192 Pac. 881; 33 C. A. D. 15	12, 16
<i>Thomson v. Langton</i> , 187 Pac. 971; 31 C. A. D. 139....	8
<i>Thomson's Estate</i> , 131 Pac. 1048 (Cal.), 165 Cal. 290....	8
<i>Trower v. City & County</i> , 157 Cal. 769.....	11
<i>Tuggle v. Minor</i> , 76 Cal. 99.....	27
<i>Van Buskirk v. Kuhns</i> , 164 Cal. 472.....	12
<i>Visher v. Wilbur</i> , 90 Pac. 1065-1068; 5 Cal. App. 562..	18
<i>Worth v. Worth</i> , 155 Cal. 593.....	31
<i>Woodville Bank v. Ricker</i> , 82 Atl. 2.....	33

No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS

(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Introductory.

The appeal is based solely on what are claimed to be errors committed in excluding testimony and in granting defendant's motion for non-suit. We believe that all evidence ruled out as inadmissible was properly so held, and the non-suit was properly granted. We are also very sure that if error is present, it is without prejudice to plaintiff's cause, and that, in any event, non-suit should have been granted, especially as all the evidence offered by plaintiff (which constituted his whole case) was before the Court.

Plaintiff in error seems to concede that this correspondence constitutes the entire case, and bases his argument wholly on the question whether or not the letters excluded from the evidence were such that had they been admitted, plaintiff in error would have been entitled to recover.

“It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him on the facts in evidence.”

Mintzer v. the City of Richmond, 27 Cal. Appeals, 566.

“Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

Act of Feb. 26, 1919, ch. 48, 40 Stat. L. 1181.

Statement of Facts.

Plaintiff in this cause seeks to recover from a guarantor whose guaranty appears upon a note maturing March 22, 1916. This promissory note reads as follows:

“Park Rapids, Minn., March 22, 1915.

March 22, 1916, after date (without grace)
for value received, I promise to pay/to the

order of The First National Bank of Park Rapids, \$4500.00 four thousand five hundred dollars with interest at the rate of 8 per cent per annum, payable annually from date, until paid. Payable at the First National Bank, Park Rapids, Minn. All the signers and endorers hereby severally waive demand, notice of non-payment and protest.

THE WHITE STORES COMPANY,
By J. Shere, Pres.
By R. F. Pray, Secretary."

The guaranty appears upon the back of the instrument, as follows:

"For value received, I guarantee the payment of the within note at maturity or any time thereafter, waiving demand, protest, and notice of protest.

J. Shere
R. F. Pray."

The note also bears the following notation:

"Endorsement on	Balance due on
principal 5/7/18 \$993.21	Principal, \$3506.70."

The note is dated March 22, 1915. It was due March 22, 1916. It was barred by Sec. 337, C. C. P., March 22, 1920. The action was commenced on February 24, 1921. The complaint set forth is third amended.

The complaint is in two counts based upon the same instrument. Bound up in the first count, and hopelessly confused there seem to be present three several causes of action.

It contains first, a positive declaration that the date of maturity of the note itself was extended by

agreement to September 19, 1919. Secondly, it seems to attempt to set forth that the entirely distinct period commencing with maturity of the note and continuing until the cause of action would ordinarily have expired from statutory lapse of time was extended by agreement. And finally, the first count presents some features which we associate with complaints based on estoppel.

The second count is free from these complexities, and rests squarely upon an acknowledgment and promise to pay, relied upon by plaintiff to toll the Statute of Limitations.

Upon the note itself in the case at bar there appears to have been entered a part payment on May 7, 1918, by someone some twenty-two months before plaintiff in error's cause of action upon the note was barred. The payment was not made by this defendant. The action is upon defendant's several liability, and no payment by the principal debtor or by his co-guarantor could operate to extend the statute to affect the defendant in this cause, even if the law in California recognized part payment as acknowledgment, which it does not.

No evidence was offered as to part payment, and no ruling exists relating thereto for criticism.

Defendant relies upon the provisions of Section 337, C. C. P.

“Actions that may be brought within four years.

1. An action upon any contract, obligation or liability (found) upon an instrument in writing.”

Defendant also rests upon Section 360, C. C. P.

“Acknowledgment or new promise must be in writing.

No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.”

Points.

We will discuss the case under the four following heads:

- I. Extension of date of maturity of note.
- II. Prolongation by agreement, of the statutory period.
- III. Estoppel to plead the Statute of Limitations.
- IV. Acknowledgment and promise, tolling the statute.

DISCUSSING POINT I.

(EXTENSION OF DATE OF MATURITY OF NOTE.)

Nowhere in the evidence offered is there visible an extension or request by defendant in error for extension of as much as a single day, or any change of date of maturity, for the note itself. The brief of plaintiff does not touch upon such suggestion, and we can safely pass over, without further com-

ment, the allegation appearing in the complaint on page 4 of the transcript that,

“plaintiff at the request of defendant extended the maturity of said note, and said maturity was extended to September 19, 1919”.

Only three letters in evidence were ever written before maturity of note. The first of these (March 29, 1915) encloses the note itself, just made. The second letter (October 7, 1912) deals with another note (\$1500.00). The third missive (February 21, 1916), written by plaintiff in error to defendant, by a postscript, confirms March, 1916, as the time for payment of the note in suit.

DISCUSSING POINT II.

(EXTENSION OF STATUTORY PERIOD.)

The period prescribed by law for the extinction of a cause of action by lapse of time was never extended by agreement in the instant case.

No letter offered in evidence written either by debtor or by creditor seeks such accommodation, or suggests the granting of such favor, had it been applied for.

The brief of plaintiff points to no foundation upon which such an extension could be predicated.

There is not one word in any of the correspondence asking for an extension, nor was there any agreement contemplated or made to extend the time for bringing suit on the original note. Suggestions

of compromise were made but none of them accepted. (These we discuss under Point III dealing with estoppel.)

DISCUSSING POINT III.

(ESTOPPEL.)

No statement of defendant to plaintiff is shown to have been in anywise false, or at all to have misled plaintiff. All the correspondence between the parties was frank, honest, open and above board, and no charge of fraud is even intimated in this action.

No act of defendant ever caused plaintiff to change its course of conduct in any respect or degree.

No circumstances are shown tending to prove that plaintiff's failure to bring suit within the statutory time was resultant from, or had ~~causal~~^{causal} connection with, any omission or commission of defendant.

With the offered evidence exposed, there is nothing to disturb our conjecture that plaintiff fell into the error of assuming that the laws of California gave as long a term in which to bring suit as is provided by the laws of Minnesota (viz., 6 years) and now seeks to saddle this inattention upon defendant.

“The person asserting an estoppel must be induced to act or refrain from acting by his opponent's conduct.”

Barnhart v. Fulkerth, 93 Cal. 497.

“That such a promise should operate as an estoppel it must be made to appear, not only that she changed her position, but that relying upon such promise an injury resulted by reason thereof.”

Mentry v. Broadway Bank etc., 129 Pac. 472;
20 Cal. App. 388.

“Estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by one to mislead the other.”

Eltinge v. Santos, 152 Pac. 918; 171 Cal. 278.

“An estoppel of the character herein relied upon cannot be predicated upon the mere expression of the intention or proposed future action of the party sought to be estopped, or upon the promise of such person to do or not to do in the future some particular act.”

Thomson v. Langton, 187 Pac. 971; 31 C. A. D. 139, citing cases, including 153 Cal. 33.

We believe that no estoppel can be founded on a capricious forbearance arising from some cause other than an agreement to forbear.

Henshaw, J., speaks of:

“the indisputable proposition that while forbearance constitutes a good consideration, that forbearance must be under an agreement to forbear, and that mere forbearance alone is not sufficient”.

In re Thomson's Estate, 131 Pac. 1048 (Cal.),
165 Cal. 290, citing,
Smith v. Compton, 6 Cal. 24; and
Shadburne v. Daly, 76 Cal. 355.

Lennon, P. J., says:

“if they found that the plaintiff did in fact forbear to sue on the note, such forbearance would not constitute a good and valid consideration for the defendant’s endorsement of the note, unless they should also find as a fact that such forbearance was founded upon and induced by a preceding promise to forbear”.

Pac. Improvt. Co. v. Maxwell, 146 Pac. 902
(Cal. App.), 26 Cal. App. 265.

A number of cases discussing estoppel to plead the Statute of Limitations are cited in *Quanchi v. Ben Lomond Wine Co.*, 120 Pac. 428 (Cal. App.), 17 Cal. App. 565, and the facts at bar will be found quite otherwise.

DISCUSSING POINT IV.

(ACKNOWLEDGMENT AND PROMISE.)

The correspondence appearing in the transcript does not measure up to the requirements of an acknowledgment and promise qualified to toll the Statute of Limitations.

Of the four parts composing plaintiff’s brief, three are devoted to this topic.

The first deals with the distinction between acknowledgments made before and after the supervision of the statute.

The second seeks to obviate the necessity for an express promise as an accompaniment to an acknowledgment of debt.

The third part bolsters up and supplements the other two.

While we readily recognize that a contract or an acknowledgment may be made upon various and separate sheets, yet we do not believe that where a cause of action is already barred by the Statute of Limitations, the law will encourage the throwing together of a protracted correspondence, in an effort to distil from it in its entirety the essence of an acknowledgment which is wholly missing from any single letter. If a defendant has upon each successive occasion, when putting pen to paper, failed to acknowledge a debt, it cannot be that by multiplying the occasions on which he did not commit himself, a clear, convincing, unequivocal, and unconditional acknowledgment of debt, evincing an intent to pay, can result.

We join with counsel for appellant in seeking to keep clearly in mind any and all distinctions between acknowledgments made before statute run, and those made after it has obliterated the debt.

Where the statute has run, we recognize that suit must always be upon the new promise.

“In this State under the code, whenever the action is brought after the statute has run, the plaintiff can avoid the demurrer to his complaint only by averring the new promise. The declaration is always on the new promise.”

Curtis v. City of Sacramento, 70 Cal. 416.

But when counsel states that before the statute has run, the action lies upon the old promise, given

new lease of life by acknowledgment, *he states the rule too broadly.*

Before the statute has run, if the acknowledgment is coupled with a single variation or condition, then the action does not lie upon the old promise, which sleeps on undisturbed, but the action is upon the substituted proposition, which must of course be pleaded.

In the case at bar, no substituted or conditional offer, or attempt at compromise is pleaded, and no letter of such character could have been admissible upon the trial.

We believe that the following postulates will be found to be the law.

- A. The Statute of Limitations is a meritorious defense, and is a plea to the merits.

St. Paul Title & Trust v. Stensgaard, 121 Pac. 731; 162 Cal. 178;

Lilly-Brackett Co. v. Sonnemann, 157 Cal. 196;

Trower v. City & County, 157 Cal. 769;

Bullion & Exchange Bk. v. Hegler, 93 Fed. 890.

- B. The acknowledgment must be a direct, unqualified and unconditional admission of a debt which a party is liable and willing to pay.

Bullion & Exchange Bk. v. Hegler, 93 Fed. 890;

Curtis v. City of Sacramento, 70 Cal. 412;

McCormick v. Brown, 36 Cal. 180;
Biddel v. Brizzolara, 56 Cal. 382;
Pierce v. Merrill, 128 Cal. 476;
Powell v. Petch, 166 Cal. 329; 136 P. 56;
Textile Nat'l. Bank v. Lawrence, 192 Pac.
 881; 33 C. A. D. 15;
Snyder v. Dederichs, 179 Pac. 535; 39 Cal.
 App. 628.

- C. The most positive acknowledgment of a pre-existing debt is insufficient if accompanied by a declaration which is inconsistent with an intention to pay.

Curtis v. City of Sacramento, 70 Cal. 412.

- D. The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt.

Bullion & Exchange Bk. v. Hegler, 93 Fed.
 890;

McCormick v. Brown, 36 Cal. 180.

- E. Or to pay the whole debt in a particular manner.

McCormick v. Brown, 36 Cal. 180.

- F. Or to pay the debt at a specified time.

McCormick v. Brown, 36 Cal. 180;

- G. Or to pay the debt upon specified conditions.

McCormick v. Brown, 36 Cal. 180.

Rodgers v. Byers, 127 Cal. 528;

Van Buskirk v. Kuhns, 164 Cal. 472.

- H. When the acknowledgment is accompanied by a particular promise, the law will imply none other.

Curtis v. City of Sacramento, 70 Cal. 412;
McCormick v. Brown, 36 Cal. 180;
Rodgers v. Byers, 127 Cal. 528;
Biddel v. Brizzolara, 56 Cal. 382;
Bullion & Exchange Bank v. Hegler, 93 Fed. 890.

- I. If the acknowledgment contains any cause of action, the action must be based upon the substituted contract which the instrument expressly states, and not upon the original and different liability.

Curtis v. City of Sacramento, 70 Cal. 412;
McCormick v. Brown, 36 Cal. 180;
Rodgers v. Byers, 127 Cal. 528.

- J. It must be certain as to amount.

Outwaters v. Brownlee, 135 Pac. 301; 22 Cal. App. 535.

- K. "In most of the states a partial payment upon an account tolls the statute. The rule is otherwise in this State, because of Section 360 C. C. P., requiring a written acknowledgment."

Furlow Pressed Brick Co. v. Balboa Land & Water Co., 200 Pac. 629 (Cal.), 62 C. D. 290.

Illustrating what will not suffice.

The case of *Bullion & Exchange Bank v. Hegler*, 93 Fed., page 890, was one based on two promissory

notes. One of these notes was due and payable one year after the date thereof, namely, July 24, 1893. An action was begun on it on the 25th of October, 1895. The Statute of Limitations at that time was two years in California, on an obligation executed out of the State.

It was claimed by plaintiff that defendant in and by an instrument in writing, dated December 10, 1896, and certain other instruments in writing, acknowledged his liability and signified his willingness to pay the note. The defendant pleaded the Statute of Limitations as against this note. The letters in this case are strikingly similar to, though much stronger than, those written in the case at bar.

There, the defendant, in his first letter says:

“Beg to say that I cannot pay the note or interest time, nor until I turn some realty or other property into cash, which seems impossible to me at present”,

and in the second:

“I don’t see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this I can pay you at least a part.”

There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff, but in neither case is it an acknowledgment from which a promise to pay a debt can be inferred. In other words, it is not an unqualified acknowledgment since it is accompanied with the condition that he cannot pay, or does not see any chance to pay, unless

he can turn some realty or other property into cash; and there is no evidence that this condition has been reached.

Judge Morrow held that these letters did not constitute such an acknowledgment or imply a promise sufficient to continue it for another statutory period of limitation, and says (page 894):

“It is now well established by the authorities that the Statute of Limitations is to be upheld and enforced, not as arising merely upon the presumption that from the lapse of time the debt has been paid or released, but upon the broad ground that it is a statute of repose, for the peace and welfare of society, and is, therefore, to be regarded favorably * * *. If the statute were to be enforced upon the theory that it merely fixes a period of time, the running of which establishes a presumption of payment, then every promise or acknowledgment in writing that would justify and infer that the debt had not been paid would be sufficient to remove the presumption of payment, and fix a new period for the running of the statute, whether the contract is a subsisting liability, or not. But if, on the other hand, the statute is one of repose, then it is clear that the writing that will bar the statute should contain an express promise to pay a pre-existing debt, or acknowledge the existence of a present debt under such circumstances that a promise to pay it can be inferred * * *”.

Calling the obligation an “indebtedness” is not sufficient to toll the statute.

Powell v. Petch, 136 Pac. 56; 166 Cal. 329.

Textile Nat. Bank v. Lawrence, 192 Pac. 880-881; 33 C. A. D. 15:

Letter as follows:

“Mr. H. Brockelhurst, c/o Textile National Bank, Philadelphia—Dear Sir: I fully realize your position, but also know my own. I agreed to pay the Jones note at the rate of \$25.00 a month, and did so until I received a peremptory demand from Mr. Darling to pay the collateral loan, advised that if not paid the bonds would be sold and you would immediately proceed against me for the difference.

I want to pay you one hundred cents on the dollar, unless you destroy my ability to make the hundred cents, and a suit for either item would cause just as much damage as for both of them. I am perfectly willing to make a monthly payment of \$25.00 now, and can do so. My prospects are getting better all the time, and my business has been developed by me from nothing to the point where it may interest outside capital. There is a project now to form a Bush terminal here, if so, my present plant is the natural nucleus. In any event, if you and your associates can see your way clear to accept a monthly payment at this time, you can depend upon it that my account will be eventually balanced without a penny of loss. I do not want any lawsuits at any time, as it can do only harm and cannot hasten matters.

I am going to be in Cincinnati as a delegate in July, and expect to be in Philadelphia for a few days. I will be glad then to state to you frankly how I am situated.

Yours very truly, V. C. Lawrence.”

Nixon v. Ramsey, 180 Pac. 649-650; 40 Cal.

App. 240:

Letter as follows:

“Jan. 14th, 1915.

“It is impossible right at the present time—for me to pay any part of the above amount—I hope to be able some time soon to hole thing thing up—I am not making any promises—I hope to be able to pay the hole thing up some day.

H. Ramsey.”

Snyder v. Dederichs, 179 Pac. 535; 39 Cal.

App. 628:

Letter as follows:

“Your letter received in regard to the money I did get from Willard. * * * Still if I would make money, and see my way through, I would send you some money, and I will the first chance that I make something I will help you. * * * I loaned a party some money which he promised sure by next month I would get \$300 of it. Should I succeed in this I will send you sure \$150 or \$200 of this. At the present time I cannot do anything on account I have not it. I know, Mrs. Snyder, the disposition how you feel, and I hope Willard makes some money soon. He has been working hard always the same as I and you know if I got it I would help you, but it is impossible to do so at the present time.”

Morehouse v. Morehouse, 69 Pac. 625-627; 6

Cal. Un. 966:

Oral statement of deceased that he would pay the money “as soon as convenient, or sooner, as soon as he could get it out of the ranch, or from Mr. Barron”.

Sherwood v. Lowell, 167 Pac. 554; 34 Cal.

App. 365.

Outwaters v. Brownlee, 135 Pac. 300-301; 22 Cal. App. 535:

Written statement as follows:

“(I) It is clear that, to bring the case within the contemplation of section 360 of the Code of Civil Procedure, there must be a distinct and unconditional admission of the debt which the party is liable for and willing to pay or a direct and unqualified promise to pay the amount of the indebtedness. If the acknowledgment be complete, the law will supply the promise to pay; and if the instrument itself contain a sufficient promise, no further acknowledgment of the debt is required.

In *Weinberger v. Weidman*, 134 Cal. 602, 66 Pac. 870, it is said: ‘The promise to pay is that which renews the obligation, and no acknowledgment is sufficient unless it at least implies a promise’.”

Visher v. Wilbur, 90 Pac. 1065-1068; 5 Cal. App. 562:

“Dear Sir and Brother: Your favor of the 14th is just received and noted. In answer will say that if the Visher estate has any valid claim against me I will pay it, if I ever get money enough to do so. Please send me the claim.”

Powell v. Petch, 136 Pac. 55-56; 166 Cal. 329:

“What is the status of my indebtedness to you regarding the lot you bought? The money that I advanced Nonie was intended to offset it, but let me know the condition.”

Pierce v. Merrill, 61 Pac. 67; 128 Cal. 464:

“Los Angeles, Cal., September 19, 1893. Orestes Pierce, Esq.—Dear Sir: I have delayed answering yr. letter relative to the bal-

ance due you as taken from the Sather Banking Co., of some \$1,700, because of a contract to deliver to the Citrus Belt Irrigation Dist. 300 inches of water, and receive \$150 M. bonds. I thought we could use a portion of these bonds in some way to wipe out all the company might owe you. There has been a delay in completing the title to the water, because the water stock was held by the San Francisco Savings Union, but they have agreed, upon a favorable report as to the legal status of the bond, to release their holdings, and take some \$60 M bonds as collateral instead of the stock. This favorable report on bonds will be forwarded in two or three days, and then, by the action of the directors of the companies, all will be completed. There seems to be no hitch from any source to prevent the completion of the contract and receive the bonds. As soon as this is accomplished, either myself or some representative of the Semitropic Company will visit you and see if we cannot make some satisfactory arrangement with you. Very truly, yours, Samuel Merrill."

The following is the telegram: "San Bernardino, Cal., December 1st. Orestes Pierce, 728 Montgomery St., San Francisco: Make no assignment of our debt. Insist on payment. Must have my stock. Please send as soon as possible. S. Merrill."

Rodgers v. Byers, 60 Pac. 42-43; 127 Cal. 528:

"I will liquidate that note as soon as I can get the money.

I wish it was in my power to send you money at this time, but it is not. Will send you some as soon as I can get it. I hope to get money soon. Will sell cattle at first good offer.

I have no intention of not paying the note, and will as soon as I can; but can't now."

Curtis and others v. City of Sacramento, 11
Pac. 748; 70 Cal. 412:

“Whereas, the city of Sacramento is indebted to the firm of Curtis & Clunie for legal services rendered by said firm in the several actions;
* * * and whereas, the board of trustees of said city and said firm differ as to the amount of said indebtedness.”

Review of the letters.

Approaching these letters offered in the case at bar with our decisions in view, we may first cull out all letters written prior to *February 24, 1917*, as not within four years prior to action. If they contained anything of a reviving nature, the statute has run again, since they were written. We may also prune away all letters written after March 22, 1920, since the action is upon the old promise, and not upon any new promise. It would have to be upon the new promise if any letter later than March 22, 1920, were relied upon.

Next, we may eliminate all letters written by persons other than defendant himself.

There will then remain the following:

November 26, 1918,
December 11, 1918,
August 8, 1919,
September 19, 1919,
October 4, 1919.

The letter of *November 26, 1918*, throws no light at all. Do the four letters, viz: December 11, 1918, August 8, 1919, September 19, 1919, and October

4, 1919, constitute an admission of debt coupled with an intent to pay?

Defendant writes (December 11, 1918) that he has just received a letter from the attorneys for the trustee of the principal debtor,

“saying that there was in the hands of trustee considerable amount for distribution to the creditors of that company, and the distribution would soon be made.

When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement.”

Here is no request for time or representation to mislead. It was a fact true and undisputed. Defendant was far away in California. Plaintiff was not far from Duluth where certain funds had accumulated. Giving this language the most extraordinary force, we cannot extract from it more than an intimation of an intent to make some sort of settlement, and that only *upon condition* of the proper application of certain other monies. etc.

As the decisions show, *any condition* dispels the idea of an acknowledgment, and further, they agree that the action where the letter contains conditions, must found itself on that letter and on those conditions, and not on the original promise. The pleadings at bar are solely on the original promise. Defendant's proposal was not satisfactory to plaintiff, and did not influence his conduct.

The letter of *August 8, 1919*, is still more vulnerable.

“I wrote Mr. Shere and told him about this offer, and asked him to pay half of *this settlement*, and *if he did*, I would pay the other half, and thus wipe this note out. Mr. Shere did not respond, and I have written him again on the subject, * * * Would you not kindly ascertain Mr. Shere’s address and take the matter up with him direct, and see if you cannot get *half of the amount that Mr. Tabor offered to settle for*, and I will send the other half, and get it out of the way.”

This whole letter discusses a compromise agreement, wholly incompatible with the implication of a promise to pay the full amount. We bear in mind that where an acknowledgment of debt is coupled with anything to detract from an implication of an intent to pay the whole debt, the law holds that there is not present an acknowledgment that will satisfy Section 360, C. C. P. Further, the offer is purely conditional. If Shere will pay half of *a proposed amount* (not the amount of the note) Pray will pay the other half of such *proposed* amount, otherwise not. We also note that the action is not based upon this letter, but on the original and distinct promise.

The letter of *September 19, 1919*, begs plaintiff to bring suit.

“See no way in which my legal rights may be determined any other way.”

Clearly, defendant was relying upon some of his defenses other than the Statute of Limitations, as at that time it had not run its length. We fail to

see how plaintiff construes this letter as containing an implied promise to pay.

By his letter of *October 4, 1919*, defendant squarely declines a compromise offer which knocks off fully half the debt. This can hardly be taken as showing a willingness to pay the whole debt. Again, he requests an action, saying:

“I referred the matter to my attorney out here and he thinks it will be satisfactory, in order to determine just what my liability is, to have suit brot on the note.”

After such a letter, written more than five months before the statute ran, it would seem clear that the defendant was anxious to face the issue, and felt prepared to meet it, without the aid of the statute. Nothing short of gross negligence can be attributed to the plaintiff bank after the defendant had begged in two successive months that suit be filed.

We now epitomize the entire correspondence.

Pith of the correspondence.

Taking up the letters in their order:

March 29, 1915 (Tr. page 46)—This letter merely encloses the note in question.

October 7, 1915 (Tr. page 47)—This letter acknowledges receipt of the note by plaintiff.

February 21, 1916 (Tr. page 47)—This letter from plaintiff merely calls attention to the fact that the note in question will be due on March 22nd.

May 23, 1916 (Tr. page 49)—Defendant declines plaintiff's suggestion that the bank will assign a mortgage to him.

June 1, 1916 (Tr. page 50)—Plaintiff requests defendant to sign new notes which defendant never does.

November 19, 1918 (Tr. page 52)—Plaintiff suggests that defendant pay one-half of the note.

November 26, 1918 (Tr. page 53)—Defendant says he will write later in reply to above.

December 2, 1918 (Tr. page 54)—Plaintiff requests defendant to give a final answer before the 15th of December.

December 11, 1918 (Tr. page 54)—Defendant says he is not anxious to stall in this matter and wants to know how much money the trustee will pay on the note.

December 16, 1918 (Tr. page 55)—Plaintiff requests defendant to accept their former proposition and they will pay him one-half that they get from the trustee.

July 31, 1919 (Tr. page 56)—Demand for payment made by plaintiff's attorney.

August 8, 1919 (Tr. page 57)—Defendant says if Shere will pay one-half, he will pay one-half.

August 29, 1919 (Tr. page 59)—Plaintiff's attorney writes Shere can do nothing. Bank withdraws offer and will not settle on basis suggested on November 19, 1918.

September 19, 1919 (Tr. page 60)—Plaintiff writes he cannot get help from Shere and let the bank sue.

September 29, 1919 (Tr. page 61)—Attorney for bank writes asking defendant to accept Shere's note for one-half the amount.

October 4, 1919 (Tr. page 62)—Defendant writes declining above and notifying bank to sue.

June 26, 1920 (Tr. page 62)—Plaintiff's attorney writes that bank would take \$2500 and pay one-half amount received from trustee.

July 22, 1920 (Tr. page 64)—Defendant replies let the bank sue.

In construing all this correspondence, we think there is one controlling principle.

Either we have to take the letters singly and find one strong and clear enough to toll the statute, or we must lump all the correspondence together and take the flavor of the whole. But if we attempt to treat all the letters as one instrument, we then find present more than one expression declaring a positive unwillingness on Pray's part to pay the half of the indebtedness which Pray all along regarded as Shere's share.

Viewed singly, no letter is strong enough for plaintiff to rest upon. Regarded unitedly, any thought of an acknowledgment within the meaning of the statute is destroyed by repeated invitations to sue, suggestions to collect from Shere, and from

the principal debtor, and other expressions wholly shutting out any implied promise to pay the whole.

Analysis of plaintiff's citations as to acknowledgments.

Plaintiff cites *Southern Pacific Co. v. Prosser*, 122 Cal. 413. That case recognizes, in the same paragraph quoted by plaintiff, that where there is an intimation (not an expression) of an intent to refuse payment, no promise arises by implication from the acknowledgment. Judge Beatty, as ever, touches the key note, saying,

“As we read the document, it was an unqualified admission of an existing debt *which defendant desired to pay.*”

That desire to pay *the entire debt* never took hold of defendant in this cause. If the correspondence may be taken by the plaintiff by the four corners as a single document, to create an acknowledgment, it must also be so taken as a single document to destroy the implication. Read as a whole, it plainly shows defendant's attitude, and many of the letters, taken severally, declare Pray's unwillingness to meet more than what he considered his just share of loss.

Plaintiff also cites *Concannon v. Smith*, 134 Cal. 20. That case discusses part payment. It is not the law today in California that part payment constitutes an acknowledgment. The quotation from *Barron v. Kennedy*, 17 Cal. 574, deals with the law before Section 360 C. C. P. was enacted (see Judge Wilbur's declaration in 200 Pac. 629, wherein it is

made clear that these earlier cases no longer control, but we think the part payment feature in *Concannon v. Smith*, is dictum, though erroneous).

Plaintiff cites *Moore v. Gould*, 151 Cal. 723. In that case (page 729):

“Following the copy of the seven hundred dollar note signed by Peterson the mortgage reads as follows:

‘Said last note of \$700 is secured by mortgage and time of payment of said note has been extended to July 18th, 1899. And the mortgagors promise to pay said notes according to the terms and conditions thereof.’

Here is a direct promise to pay the note, following a recital that the time of payment has been extended to July 18, 1899. * * * Construing the language as importing a promise to pay the seven hundred dollar note on July 18, 1899, the action, commenced on February 17, 1903, was not barred by Sec. 337, C. C. P.”

McCormick v. Nofziger, 10 Cal. App. 241, is next relied upon. That case does not even tell us what the language of the acknowledgment was, merely saying,

“that on June 6, 1906, defendant in writing acknowledged its obligation in the sum of \$400.00 to plaintiff”.

Tuggle v. Minor, 76 Cal. 99, is cited.

In that case, defendant made out in his own handwriting a clear itemized account, bringing down a balance, writing upon it:

“On my return from New York, I will settle the above account with P. Tuggle personally.

Oct. 6, 1879, B. B. Minor.

Oct. 4, 1881, This agreement renewed this day. B. B. Minor."

What else could the word "settle" mean in this instance, except pay? In the case at bar, when the defendant used the word "settle", the proposition under discussion to be settled was a proposition not to pay the whole, but to pay less. And no suit has been brought upon that proposal which never became final.

In *Auzerais v. Naglee*, 74 Cal. 67, the Court said:

"We think that there can be little doubt but (sic) that the term "settle" has a double meaning, and is used alike to denote an adjustment of a demand, and a payment.

This being so, it was proper for the author of the letter continuing the declaration to explain in which of the two senses he used the expression.

In other words, there was an ambiguity upon the face of the instrument."

Plaintiff next cites *Minifie v. Rowley*, 202 Pac. 673. The intent of the defendant in that case to recognize his debt is at once gathered from his letter, emphasized by the accompanying remittance.

We believe that the quotation from *Minifie v. Rowley*, that

"there may be an acknowledgment by conduct as well as words",

is not the law of California today. It was dictum in the case where it appears. However that may

be, the case at bar is based wholly on correspondence, and conduct does not enter.

The Court says, at page 675:

“The effect of this provision (C. C. P. 360) is not to require that the new or continuing contract must consist of a written acknowledgment or promise. There may be an acknowledgment by conduct as well as by words. In the case of a part payment, for instance, of either principal or interest, the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal acknowledgment of the subsisting contract or liability from which a new contract to pay the debt must be inferred. Section 360 of the Code of Civil Procedure makes an attempt to regulate the character of the acknowledgment itself. Its sole purpose is to order the form of the evidence to prevent a parole proof of the acknowledgment or promise, whether the latter be in the form of words, or acts. Therefore, where an act of payment after the statutory period is evidenced by a clear and unqualified written memorandum, the acknowledgment is contained in some writing within the meaning of the code sections, even though the writing itself does not contain a distinct recognition of the subsisting liability. The acknowledgment consists of an act of payment, from which a new contract is inferred.”

In *Curtis v. Holec*, 195 Pac. 397, cited by plaintiff, the Court says:

“While the extension agreement in the instant case does not, in so many words, make mention of the mortgage, still that agreement was written upon the back of the mortgage note, and made express reference thereto.

The note upon its face, bore the caption 'note secured by mortgage', and therefore considered and construed in connection with the note to which it referred, the agreement to extend the time for the payment of the note constituted an unqualified acknowledgment of the mortgage and the debt secured thereby, sufficiently *direct and distinct* to arrest the running of the Statute of Limitations."

On page 26 of its brief appellant cites *Furlow v. Balboa*, 200 Pac. 629; 62 C. D. 290, as holding that the mere entry of payment upon the open book account tolls the statute. We think that counsel here has seized on loose language, and that the question decided in that case was not what would *revive* the statute, but merely just when it *started running* on a book account. The exact language is as follows:

(p. 629) "In most of the states a partial payment upon an account tolls the statute. The rule is otherwise in this State, because of Section 360, C. C. P., requiring a written acknowledgment, but it is a reasonable construction of the legislation fixing a different period of limitation upon an open book account from an ordinary account to hold that the payment made and entered upon the open book account tolls the statute. It follows that the Statute of Limitations began to run on this account on August 13, 1914, and that the amended complaint filed May 15, 1918, was within the four years."

Plaintiff cites *Foster v. Bowles*, 138 Cal. 350. The Court there says:

"The note and mortgage were in full force and unaffected by the Statute of Limitations when respondents made their written agree-

ment of December 30, 1893, in which they clearly recognized and acknowledged the existence of the mortgage in question and made provision for payment of interest thereon out of income from the premises.

Also a few days earlier in the same month, the trust deed to which they were parties, and which they accepted in this agreement of December 30th, by express recital declared, 'And whereas, there is now existing a mortgage for the sum of about twenty thousand dollars against said tract hereinbefore described,' and provided for payments on account of this mortgage, and thus expressly acknowledged the existence of the indebtedness, as well as of the mortgage."

We have no quarrel with the law in *Worth v. Worth*, 155 Cal. 599, or with *Chaffee v. Brown*, 109 Cal. 211. In the latter case, the opinion does not recite the language which sufficed for an acknowledgment.

Clunin v. First Federal Trust Co., 35 C. A.

D. 746 (July 26, 1921);

"The acknowledgment and payment both being embodied in the check and being in writing, the fact does not rest to be proved by oral testimony. * * * It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of interpretation."

Cotcher v. Barton, 33 C. A. D. 144 (Sept. 11, 1920).

This case is inconsistent with 200 Pac. 629 if it holds that a payment of interest suffices for an acknowledgment. Probably the true rule in that regard is that a payment of interest, nothing more being shown is not a sufficient acknowledgment, but that if such payment be by check containing a memorandum referring to the principal sum and signed by the party, as all checks are, then the mere fact that the acknowledgment is thus manifest upon a check instead of upon some other piece of paper is immaterial. As we have pointed out before, the defendant guarantor, made no payment in the case at bar, the action is against him on his several liability, and the above question while of great general interest, does not concern us here.

In *Auzerais v. Naglee*, 74 Cal. 69, Naglee himself wrote upon the very account itself:

“Received, December 8, 1880, of Henry M. Naglee, one thousand dollars on account of the within.”

Thereupon Auzerais signed the receipt. The Court said:

“The part payment was evidenced by a writing. It was in the handwriting of defendant. His signature was contained thereon. The Statute does not require the party to *subscribe* his name.”

The Court held that Naglee had “signed”, though he had not “subscribed” his name.

CONCLUSION.

Plaintiff's analysis of the correspondence between plaintiff and defendant seems to be based on the theory that any mention of the note by defendant which did not deny his liability on the note would constitute a sufficient acknowledgment to toll the statute and that in order for defendant to plead the statute as a defense and to be successful in such a defense, it would be necessary for him either to remain silent when written to by plaintiff, or to have stated in each letter replying to the plaintiff that he did not owe the money. If the theory contended for by plaintiff is correct, then the case of *Bullion and Exchange Bank v. Hegler*, 93 Fed., page 890, and the many other cases cited by us and holding that the cause of action was barred by the Statute of Limitations, have been erroneously decided, because in each of these cases the defendant mentioned the obligation in some way.

In the letter of May 23, 1916, defendant says (Tr. page 50):

"I am not in a position at this time to take advantage of the offer made in the last paragraph of your letter."

In other words, Mr. Pray had merely declined the request for payment made in behalf of plaintiff.

The case of *Woodville Bank v. Ricker*, 82 Atl. 2 (Vt.), cited by plaintiff on page 32 of the Brief, has no bearing, because there is no provision in the

Vermont Statute similar to our Section 360 of the Code of Civil Procedure.

Plaintiff argues that if these letters do not constitute an acknowledgment of the debt, it is difficult to see what they mean. The same argument would be true of the following language in the Bullion case:

“Have neglected answering your letter calling my attention to note and interest due. Referring to the notes I don’t see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this I can pay you at least a part.”

Certainly in the Bullion case there was no repudiation, no conditional offer, nor any express promise.

Plaintiff maintains, on page 32 of his Brief:

“These letters are either an acknowledgment or repudiation of the debt.”

As a matter of fact, they were neither. While plaintiff maintains “there can be no middle ground”, we must emphatically maintain that there not only can be, but that in all the cases we have cited as illustrations there was a middle ground. By merely mentioning the note defendant did not acknowledge the debt, within the meaning of C. C. P., Sec. 360, nor did he necessarily repudiate it. But it is certain that by merely mentioning the debt, he did not waive the defense granted to him by Sections 337 and 339 of the Code of Civil Procedure.

Before the statute had run, and during the time when most of these letters had passed, defendant had taken the position that plaintiff should begin suit. This was not necessarily a denial of liability, but plaintiff construes it as an acknowledgment of indebtedness. The fact of the matter is, and the correspondence shows, that plaintiff was constantly endeavoring to make some kind of settlement with defendant, but that defendant and plaintiff never did agree on any term of settlement, and that before the Statute of Limitations had run in California, defendant had told plaintiff in at least two letters that it should sue him. Had plaintiff done this within the five or six months left it, there could have been no defense of the Statute of Limitations.

The delay in this case was not caused by the acts of defendant as plaintiff suggests, because the correspondence clearly shows that plaintiff was delaying for reasons of its own, and that they were constantly making suggestions to defendant to make part payment. The delay was the delay of the plaintiff and not the delay caused by the defendant.

In his letter of August 8, 1919 (Trans. page 57), defendant wrote:

“If you can get a half from Mr. Shere, I will send the other half, and get it out of the way.”

Plaintiff replied that it could not get the money. This certainly did not constitute a sufficient written acknowledgment within the meaning of our statute and the decisions interpreting it, so that it could

be converted into a new promise to pay the whole obligation.

Here we have no evidence of a new or continuing contract by which to take the case out of the operation of the statute, and an invitation to sue cannot certainly be construed into an extension of the statute.

While plaintiff argues that this Court is bound by the California cases and by the interpretations placed on the California statutes by the Courts of this State, he has endeavored to bolster up his argument by numerous citations from other jurisdictions whose rules governing limitations do not agree with those of California.

It cannot be that, in the ~~face~~^{face} of the provisions of our code, the letters offered by plaintiff were either separately or collectively admissible to prove either a tolling of the statute or a new promise, such as is required under our law. It follows that the non-suit granted in this case was granted properly, and even had the letters been admitted that the Court must have granted a non-suit because the letters did not constitute a waiver of defendant's right to plead the Statute of Limitations, and his right to successfully set it up as a defense, nor did these letters singly, or collectively, constitute a waiver of that right, or take the defense away from defendant, but defendant could always successfully rely on this defense in the State of California.

We again wish to emphasize the erroneous position taken by plaintiff that because there was no repudiation of the obligation (if invitations to begin suit do not constitute repudiation) there could be no successful plea of the Statute of Limitations, and that any mention of the note made by defendant would constitute an acknowledgment.

The true rule is laid down by Judge Morrow in the case of *Bullion and Exchange Bank v. Hegler*, when he says (page 895):

“There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff, but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred.”

We submit that all rulings on the trial were proper, and that no prejudice has resulted, regardless of the rulings.

Dated, San Francisco,

May 13, 1922.

Respectfully submitted,

ALBERT A. ROSENSHINE,

GOLDMAN, NYE & SURR,

Attorneys for Defendant in Error.

No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS
(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

WILLARD P. SMITH,

MARK J. WOOLEY,

Attorneys for Plaintiff in Error.

FILED

MAY 31 1922

F. D. MONOKTON,
CLERK

No. 3854

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS
(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

**THE LETTERS ARE A SUFFICIENT ACKNOWLEDGMENT TO TOLL
THE STATUTE OF LIMITATIONS.**

Defendant in his brief absolutely confuses this case as he has the idea that even though the acknowledgment of the note was made before the note had outlawed yet the acknowledgment alone was not sufficient but there should have been a promise to pay it. And the trial court made the same mistake. Otherwise, it could not have ruled out the letters offered by us in evidence.

This case is in reality a very simple one. It is merely the case of an acknowledgment of a note

made prior to the outlawing thereof. As this court well knows in such a case there need not be a promise to pay the note. Therefore, a great many of the cases cited by defendant in his brief are not in point and cannot be considered as they are cases where the obligation had already outlawed before the act or acts that were claimed to overcome the statute of limitations took place. In such a case there must be, as this court is well aware, a promise to pay the obligation.

Now, do the letters offered by us in evidence constitute an acknowledgment of the note sufficient to toll the statute of limitations? They certainly do. Otherwise, they mean nothing. And in the construction of these letters this court must bear in mind that it is not dealing with a case where judgment was rendered after full trial, on appeal from which the evidence is to be interpreted most strongly in favor of the trial court's decision, but that it is dealing with a case where a judgment of non-suit was rendered, on appeal from which, as well as on the decision of the motion for the non-suit itself, every intendment is to be in favor of the plaintiff and every doubt as to the evidence resolved against the defendant. Keeping this thought in mind it is clear that the letters are a sufficient acknowledgment.

Eliminating the letters written more than four years prior to the date of the commencement of this suit, which was February 24th, 1921, according to

defendant's own admission on page three of his brief, the first letter written before the note outlawed on its face, which was March 22nd, 1920, and during the period of four years prior to the date of the commencement of this suit, was the letter of the president of the plaintiff to the defendant dated November 19th, 1918 (Transcript pages 27-8) to the effect that the plaintiff is holding the note sued upon in this action and that it has received thereon from the trustee for the maker \$993.21, leaving a balance of \$3506.79 due on the principal thereof. This letter also offers to release the defendant as a guarantor of the note upon his paying \$1753.40, that is, one-half of the above balance. The real answer to this letter is found in the letter from the defendant to the president of the plaintiff dated December 11th, 1918 (Transcript pages 30-1), the intervening letters being merely a letter dated November 26th, 1918, from the defendant that he will answer the above mentioned letter of November 19th, 1918, and a letter from the president of the plaintiff dated December 2nd, 1918, again asking defendant to answer said letter of November 19th, 1918. Said letter of December 11th, 1918, from defendant to the president of the plaintiff refers to the correspondence which had passed between them in regard to the note and states that defendant had been informed that there was in the hands of the trustee for the maker of the note a considerable amount of money, which would very soon be distributed among the creditors of the maker. In said letter defendant also

states that he does not wish to stall the matter off but feels that before making settlement the amount received by the plaintiff from the trustee should be applied on the note.

What does this letter mean? It simply means that the defendant does not wish to put off paying the note but feels that before he does pay it the plaintiff should apply on the note the money which defendant says plaintiff will shortly receive from the trustee. As this is the purport of the letter it is, of course, an acknowledgment of the note itself. What else could it be? When a guarantor on a note says to the holder of it that he does not wish to put off paying the note but that he feels that it is only right that the holder should apply what he receives from the maker before he, the guarantor, pays the note, what does he do? He certainly does not repudiate the note or indicate an intention that he cannot or will not pay it. But he does just the opposite. He unqualifiedly acknowledges that the note is a subsisting obligation as against him. There can be no other sensible meaning to this letter of defendant.

And this letter of defendant is also a promise to pay the note, for the defendant says in effect that he is ready to make payment but that before he does so he feels that the amount received from the trustee should be applied on the note. There is not a word in the letter to the effect that defendant repudiates the note or that he is not willing to or cannot pay it. The letter meets fully the requirements as to

acknowledgments sufficient to toll the statute of limitations laid down not only by the cases cited by us in our opening brief but also by the cases cited by defendant in his brief.

It cannot be said that this acknowledgment or promise is conditional as the defendant in this letter does not make the application of the amount received from the trustee a condition of his paying the note. He merely says that he feels that it is only proper that such application should be made before he pays the note. But even if he did make it a condition it would make no difference, for, plaintiff would not have to wait forever to receive more money from the maker of the note (it did wait two years and three months, which was certainly much more than a reasonable time, which is all that it would have to wait) and it appears that plaintiff never did receive anything more on the note since the defendant, on whom, as this court well knows, rested the burden of proving payment, did not prove that anything more had been paid on the note than the sum of \$993.21, which the complaint alleges, such allegation not being denied by the answer, was paid on May 15th, 1918, such date being long prior to defendant's said letter of December 11th, 1918. Therefore, even if the application of the amount received from the maker were a condition, the condition was fulfilled, because nothing was received.

Nor can it be said that defendant in his said letter is merely acknowledging the note to the extent of the amount the letter of the plaintiff of November

19th, 1918, offered to take. The defendant's letter does not even intimate such a thing. Even if it did, however, it would cut no figure for a debtor can acknowledge part of a debt and the acknowledgment will be good as to the part. See

Oliver v. Gray, 1 Harr. & G. (Md.) 204.

But, to repeat, there is nothing in the defendant's letter to indicate that he intended to acknowledge his liability for only part of the note. The letter refers to the note generally and not to any partial liability upon it and when the defendant speaks about paying he does not say a word about paying only a portion. It is clear that when the defendant acknowledges the note he acknowledges his liability for the whole of it and not merely for a part. But if this court should think that the phraseology of the letter is at all doubtful upon this point it must resolve such doubt in favor of plaintiff and hold that the letter intends to acknowledge the note as a whole, because, as we have said before, this is an appeal from a judgment of non-suit and every doubt upon the evidence must be resolved in favor of the plaintiff. From this letter of defendant it is, at most, slightly doubtful whether defendant was referring to his willingness to pay the whole of the note or the portion thereof that the plaintiff had offered to take.

It is evident that this letter is alone ample to constitute an acknowledgment sufficient to toll the statute of limitations. And so, the subsequent letters may be eliminated from consideration. Defendant contends that in these subsequent letters, the first of

which was written eight months after defendant's said letter of December 11th, 1918, defendant merely offered to pay a part of the note. But even if he did, what difference would it make? He could not in this manner nullify or affect in any way the previous unqualified acknowledgment of the note made in his said letter of December 11th, 1918.

THE CASES CITED BY DEFENDANT.

All of the cases cited by the defendant on this question as to the requirements of an acknowledgment sufficient to toll the statute of limitations are, with the exception of the cases discussed below, cases where the alleged acknowledgment took place after the statute had run and have, of course, as this court is well aware, no application whatever to our case. They must for that reason, be disregarded. Therefore, only the other cases cited by the defendant will be discussed. They are the following:

In *Rodgers v. Byers*, 127 Cal. 528, as appears from page 19 of defendant's own brief, the promise was to pay when able. This is also true of *Van Buskirk v. Kuhns*, 164 Cal. 472. And whatever is said in these cases to the effect that the plaintiff must sue, not on the note, but on the new promise and that he must also allege that the defendant is able to pay, can have no application to our case since, as pointed out above, the defendant's letter of December 11th, 1918, does not make the crediting of the amount received from the trustee for the maker a condition of

his paying the note, and since, even if it did, such promise is sufficiently alleged by the allegations of our complaint to the effect that the defendant acknowledged the note and promised to pay the same and by the further allegation that nothing had been paid on the note except the payment mentioned in the complaint. Such a condition, that is, that all amounts received from the maker shall be credited before the guarantor pays the note, is really not a condition at all or such a condition as makes the promise to pay a new promise separate and distinct from the note, for such a condition is a condition existing in connection with every obligation, namely, that all payments must be credited thereon before any person liable therefor can be required to pay it. At all events it is not such a new promise as is the promise set forth in these two cases, that is, a promise to pay the obligation when able.

In *Sherwood v. Lowell*, 34 Cal. App. 365, it was held that the acknowledgment was not sufficient as it was not signed by the defendant.

In *Outwaters v. Brownlee*, 22 Cal. App. 535, the writing signed by the party sought to be charged recited that he had a certain sum of money on deposit in bank which he wished on his death paid to plaintiff for kindness shown him by her. The court very properly held that this was not an acknowledgment of an indebtedness.

Nixon v. Ramsey, 40 Cal. App. 240, was a case where, as appears from page 17 of defendant's

brief, the defendant wrote that it was impossible for him to pay at the time but that he hoped to pay up some day but was making no promises. Defendant's own statement is sufficient to show the absolute inapplicability of this case.

Morehouse v. Morehouse, 6 Cal. Unrep. 966, is not in point since, as also appears from page 17 of defendant's brief, the defendant promised to pay as soon as convenient or as soon as he could get it out of the ranch or from Mr. Barron. This was, of course, held to be insufficient.

A similar case is *Visher v. Wilbur*, 5 Cal. App. 562, where, as appears from page 18 of defendant's brief, the defendant merely promised to pay "if he ever got money enough to do so".

We now come to a discussion of defendant's last authority and the one on which he pins the most faith, namely, the case of *Bullion and Exchange Bank v. Hegler*, 93 Fed. 890, which was decided by Judge Morrow of this court. But that case is not in point either.

In that case the defendant's letter, which was sought to be deemed an acknowledgment sufficient to toll the statute of limitations, stated that defendant could not pay the note until he could turn some realty or other property into cash. Judge Morrow held that this was an acknowledgment of the note and indebtedness but that it was not an acknowledgment from which a promise to pay the debt could be inferred. Of course, it was not and simply be-

cause the defendant said he could not pay the note. But this has no application to our case. In our case the above mentioned letter of defendant of December 11th, 1918, instead of saying that defendant cannot or will not pay says in effect just the contrary; that is, that the defendant is perfectly willing to pay but that he feels that before he pays the note the amount received from the trustee for the maker should be applied on the note. So, it is apparent that this decision by Judge Morrow as applied to the facts of that case has no application whatsoever to our case. But the rules of law laid down in Judge Morrow's opinion have application to our case and really make his decision one in our favor instead of being in favor of the defendant. For, he there holds that where the acknowledgment is sufficient to infer a promise to pay the debt it is sufficient to toll the statute of limitations. And that is exactly as above pointed out, what the defendant's said letter of December 11th, 1918, does.

Judge Morrow also correctly points out in his decision that the law of California as interpreted by the courts thereof is to govern this case of ours now before this court. This being so, there is no question but what we are entitled to a reversal of this case, since all the California cases as well as the other cases cited by us hold that acknowledgments, many of them much weaker than the acknowledgment contained in defendant's said letter of December 11th, 1918, are sufficient to toll the statute of limitations. Not one of the cases cited by defendant

is opposed to our case and we believe that there are none.

We cited in our opening brief in support of our contention now under discussion numerous California and other cases but would like, just for a moment, to call the court's attention again to one of them, namely, *Southern Pacific Co. v. Prosser*, 122 Cal. 413, as it is such a strong case and is also cited by Judge Morrow in his opinion, referred to above, as correctly stating the law.

In this *Southern Pacific Co. v. Prosser* case the acknowledgment read as follows:

“Dear Sir: Referring to the traction engine at Auburn owned by me and mortgaged to the S. P. Co., I have not been able to sell it—now sir, can't you give me a chance to pay you in work? The company employs many men, and if you choose, you can procure some employment for me. I have a sick family and am hard up personally and need work and want to pay you besides.
W. S. Prosser.”

It is apparent that this acknowledgment is much weaker than that contained in defendant's said letter of December 11th, 1918, for in the *Prosser* case he did not say that he would pay or could pay, but merely that he wanted to pay. In fact, his letter intimates that he cannot pay as he asks the treasurer of the railroad company, to whom the letter was addressed, to let him pay his indebtedness by working for the company. Yet, the Supreme Court of California, whose decision must be held to be determinative of the question, held that *Prosser's* letter

was sufficient to toll the statute of limitations. The principle on which that case is based is, that a writing acknowledging the existence of the debt, which does not show an unwillingness to pay, is sufficient to overcome the statute of limitations. That is exactly the status of the above mentioned letter of defendant of December 11th, 1918. Therefore, that letter is sufficient to toll the statute of limitations. This Prosser case is alone, without the other cases cited by us, sufficient authority to require this court to reverse the judgment of the trial court.

Consequently, it is respectfully asked that the judgment be reversed.

Dated, San Francisco,

May 31, 1922.

Respectfully submitted,

WILLARD P. SMITH,

MARK J. WOOLEY,

Attorneys for Plaintiff in Error.

No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS,
(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

WILLARD P. SMITH,

MARK J. WOOLEY,

Claus Spreckels Building, San Francisco,

*Attorneys for Plaintiff in Error
and Petitioner.*

WALTON C. WEBB,

Mills Building, San Francisco,

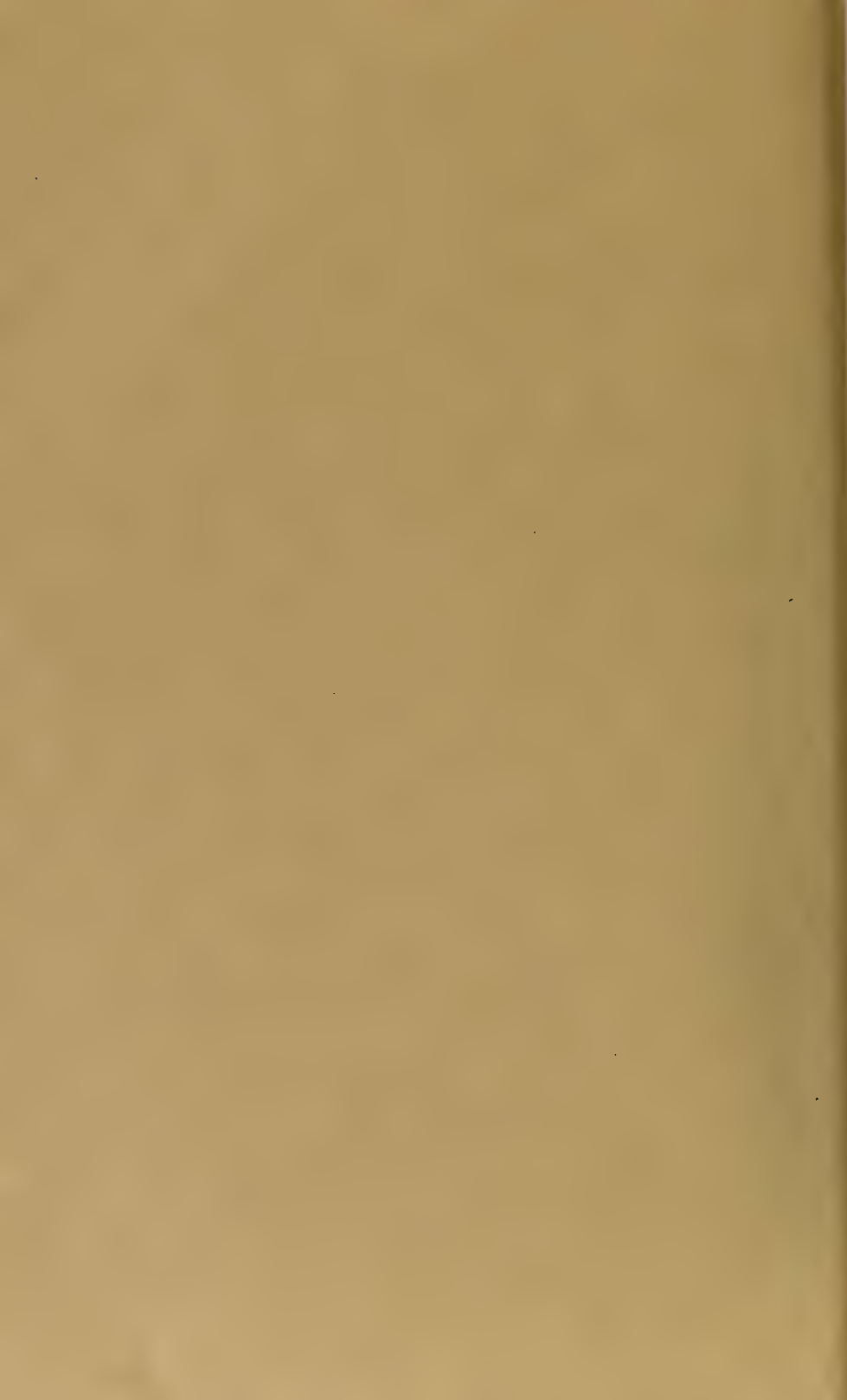
Of Counsel.

FILED

NOV 1 1911

U. S. DISTRICT COURT

SAN FRANCISCO



No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF PARK RAPIDS,

(a corporation),

Plaintiff in Error,

VS.

R. F. PRAY,

Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

It is respectfully submitted that the dissenting opinion in this action is the correct opinion therein and that the prevailing opinion is incorrect and that, therefore, a rehearing should be granted.

The prevailing opinion is based wholly on the case of *Clunin v. First Federal Trust Company* (64 Cal. Dees. 53), which case, it is respectfully submitted, is not at all in point. Therefore, such opinion must fall. The *Clunin* case correctly states the law as applied to the facts involved in that case, but such

facts are not at all like the facts involved in our case. In that case, as appears from the opinion of the Supreme Court of the State of California therein and as also appears from the prevailing opinion of this Court in our case, the writings by which it was sought to defeat the statute of limitations were check stubs, reciting the obligation on account of which the checks were given, and the checks themselves. Upon these facts the Supreme Court of the State of California very properly held that the stubs, although they described the indebtedness, could not be used to toll the statute of limitations as they were not communicated to the creditor and that the checks were insufficient for that purpose because they did not refer to any debt whatever. In confirmation of this, see page 55 of the opinion in the Clunin case where the Supreme Court of the State of California said:

“So far as the stubs are concerned, it is well established in this state that they do not constitute an acknowledgment or a promise sufficient to take the case out of the statute of limitations, since they were never communicated to the creditor, Mrs. Clunin”,

and also see page 57 of the opinion where the Supreme Court said:

“The checks introduced in evidence do not come up to this standard since they contain no reference whatever to any debt or any language which can be said to be uncertain in its meaning and subject to explanation by the aid of extrinsic circumstances so as to be made to refer to a debt.”

This is the sum and substance of the decision of the Supreme Court of the State of California in this Clunin case and it is apparent that it has no application whatever to our case.

In our case the defendant's letters to the plaintiff clearly refer to his obligation upon the note, which fact is conceded by the prevailing opinion of this Court. Consequently, the question in our case is, whether (the receipt by the creditor of letters referring to the indebtedness being conceded) such letters by their phraseology constitute a sufficient acknowledgment under section 360 of the Code of Civil Procedure of the State of California. A very different question from that involved in the Clunin case, where all the Court had to decide was, that the checks were insufficient because they referred to no debt whatever and that the stubs were insufficient because they were not communicated to the creditor.

So, the Clunin case must be eliminated from consideration so far as its facts and the questions really decided therein are concerned. And it must also be disregarded if any of the language of the opinion therein can be deemed to uphold the prevailing opinion in our case, since the language of the Court in the Clunin case can only be considered as applying to the facts of that case. But, as a matter of fact, even the language of the opinion in the Clunin case does not support the prevailing opinion in our case.

The only language in the opinion in the Clunin case, declaring the law in reference to the sufficiency of an acknowledgment under said section 360, is that contained in the following two quotations therefrom, the remainder of the opinion, so far as it deals with such question, being merely a resume of what has been held in a number of California cases as to the sufficiency of such an acknowledgment, namely: first, on page 55 of the opinion, where the Court said:

“The law is well established in this state by numerous decisions that the acknowledgment or promise referred to in section 360 must be in writing, and that the writing, whether in the form of a promise or not, must contain some reference to an existing debt owing to the creditor which the debtor is willing to pay”, and, second, on page 57 of the opinion, where the Court said:

“It is clear from all these decisions (referring to the decisions in California) that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay.”

This language, which is, in effect, that the writing must refer to a debt that the debtor is liable and willing to pay, certainly does not uphold the prevailing opinion of this Court in our case, for it does just the contrary. But, passing that for a

moment, it is first necessary to ascertain the exact effect of this language. As the Court itself expressly says, it is a statement of the law in California based upon the decisions of its Supreme Court, a resume of the same being given in the opinion, as above mentioned. Consequently, this statement of the law must be read and interpreted solely with reference to what was really decided by the California cases referred to by the Court and not by what one might think the Court meant by the use of this language. In this connection, it must be remembered that the Court in the Clunin case did not attempt to prescribe what form the writing should take in order that it should "refer to an existing debt that the debtor is liable and willing to pay", and it had no occasion to do so, as the writings therein involved, to-wit: the checks and stubs, were insufficient because the stubs were not communicated to the creditor and the checks referred to no debt whatever. The Court, as said before, simply declared that its previous decisions laid down a general rule of law, namely, that the writing must refer to an existing debt that the debtor is liable and willing to pay, leaving the question as to what form the writing should take an open one except in so far as it had been determined by its previous decisions.

Now, reading this language of the opinion in the Clunin case, namely, that the writing must refer to a debt that the debtor is liable and willing to pay, with reference to the previous decisions of the

California Supreme Court referred to in said opinion, it is evident that this language does not mean, as the prevailing opinion in our case would seem to indicate, that the writing must state, in so many words, that the debtor is liable for the debt or that he is willing to pay the debt but it is sufficient if the writing amounts to an admission of the debt and does not show an intent not to pay, or in other words, if the writing recognizes the debt as an obligation the law will presume a willingness to pay.

An examination of these previous California cases shows this to be so. There is not even an intimation in any of them that the writing must state, in so many words, that the debtor is liable for the debt or that he is willing to pay it. And to the contrary is the case of *Southern Pacific Company v. Prosser*, 122 Cal. 413, the only case in California where the facts approach those in our case and the only case in California exactly in point on our case, *which Prosser case is cited with approval by the opinion in the Clunin case* and becomes by virtue of such approval, the latest construction of said section 360 by the California Supreme Court so far as the facts therein involved are concerned. This Court will recollect that the prevailing opinion holds that the latest construction of the state statute is to govern this Court. Consequently, this Court is governed by this Prosser case as its facts, as above stated, more nearly approach those in our case than do the facts of any other California case.

This Prosser case was cited by us both in our opening and closing briefs on the original submission of the appeal but is not even referred to in the prevailing opinion of this Court in our case, although the writer of that opinion, who also wrote the opinion in the case of *Bullion and Exchange Bank v. Hegler*, 93 Fed. 890, refers in his opinion in the latter case to said Prosser case and says that it correctly states the law. The portion of the opinion in the Clunin case referring to said Prosser case is omitted from the prevailing opinion of this Court in our case, although other portions thereof referring to other California cases, not at all in point, are set forth in said prevailing opinion. The opinion in the Clunin case quotes with approval the following from the opinion in the Prosser case (the same being entirely omitted from the prevailing opinion in our case), viz.:

“The distinct and unqualified admission of an existing debt contained in a writing signed by the party to be charged, and *without intimation of an intent to refuse payment thereof*, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same.”

As this Prosser case is so important and the only California case exactly in point and the case which must control the decision of our case, we hope this Court will pardon us for calling its attention again (we having already done so in our opening and closing briefs) to the wording of the acknowledg-

ment therein held by the Supreme Court of California to be sufficient to overcome the statute of limitations. This acknowledgment which was contained in a letter read as follows:

“Dear Sir:

Referring to the traction engine at Auburn owned by me and mortgaged to the S. P. Co., I have not been able to sell it—now sir, can’t you give me a chance to pay you in work? The company employ many men, and if you choose, you can procure some employment for me. I have a sick family and am hard up personally and need work and want to pay you besides.

W. S. Prosser.”

It is apparent that this acknowledgment is much weaker than that contained in the letter of December 11, 1918, written by the defendant in our case, for in the Prosser case he did not say that he would pay or could pay, but merely that he wanted to pay. In fact, his letter intimates that he cannot pay, as he asks the treasurer of the railroad company, to whom the letter was addressed, to let him pay his indebtedness by working for the company. Yet, the Supreme Court of California held that Prosser’s letter was sufficient to toll the statute of limitations. The principle on which that case is based is, that a writing acknowledging the existence of the debt, *which does not show an unwillingness to pay*, is sufficient to overcome the statute of limitations. That is exactly the status of the above mentioned letter of defendant of December 11, 1918. Therefore, that letter is sufficient to toll the statute of limitations.

Now, to consider briefly the above mentioned letter of defendant and his other letters and the plaintiff's letters offered in evidence, all of which, as this Court says in the prevailing opinion in our case, relate to the note in controversy. We hate to take up this Court's time in doing this, as we have already done so in our opening and closing briefs, but it seems necessary so as to present clearly to this Court the fact that these letters are a sufficient acknowledgment to defeat the statute of limitations.

The letters offered by us in evidence most certainly constitute an acknowledgment of the note sufficient to toll the statute of limitations. Otherwise, they mean nothing. And in the construction of these letters this Court must bear in mind that it is not dealing with a case where judgment was rendered after full trial, on appeal from which the evidence is to be interpreted most strongly in favor of the trial court's decision, but that it is dealing with a case where a judgment of non-suit was rendered, on appeal from which, as well as on the decision of the motion for the non-suit itself, every intendment is to be in favor of the plaintiff and every doubt as to the evidence resolved against the defendant. Keeping this thought in mind, it is clear that the letters are a sufficient acknowledgment.

Passing over for the sake of brevity the earlier letters, we come to the letters of November 19 and December 11, 1918, which contain the real acknowledgment. The letter of November 19, 1918 (Tran-

script pages 27-8) was from the president of the plaintiff to the defendant and is to the effect that the plaintiff is holding the note sued upon in this action and that it has received thereon from the trustee for the maker \$993.21, leaving a balance of \$3506.79 due on the principal thereof. This letter also offers to release the defendant as a guarantor of the note upon his paying \$1753.40, that is, one-half of the above balance. The real answer to this letter is found in the letter from the defendant to the president of the plaintiff dated December 11, 1918 (Transcript pages 30-1), the intervening letters being merely a letter dated November 26, 1918, from the defendant that he will answer the above mentioned letter of November 19, 1918, and a letter from the president of the plaintiff dated December 2, 1918, again asking defendant to answer said letter of November 19, 1918. Said letter of December 11, 1918, from defendant to the president of the plaintiff refers to the correspondence which had passed between them in regard to the note and states that defendant had been informed that there was in the hands of the trustee for the maker of the note a considerable amount of money, which would very soon be distributed among the creditors of the maker. In said letter defendant also states that he does not wish to *stall the matter off* but feels that before making settlement the amount received by the plaintiff from the trustee should be applied on the note.

What does this letter mean? It simply means that the defendant does not wish to put off paying the note but feels that before he does pay it the plaintiff should apply on the note the money which defendant says plaintiff will shortly receive from the trustee. As this is the purport of the letter, it is, of course, an acknowledgment of the note itself. What else could it be? When a guarantor on a note says to the holder of it that he does not wish to put off paying the note but that he feels that it is only right that the holder should apply what he receives from the maker before he, the guarantor, pays the note, what does he do? He certainly does not repudiate the note or indicate an intention that he cannot or will not pay it. But he does just the opposite. He unqualifiedly acknowledges that the note is a subsisting obligation as against him. There can be no other sensible meaning to this letter of defendant.

And this letter of defendant is also a promise to pay the note, for the defendant says in effect that he is ready to make payment but that before he does so he feels that the amount received from the trustee should be applied on the note. There is not a word in the letter to the effect that defendant repudiates the note or that he is not willing to or cannot pay it. The letter meets fully all the requirements as to acknowledgments sufficient to toll the statute of limitations.

It cannot be said that this acknowledgment or promise is conditional, as the defendant in this let-

ter does not make the application of the amount received from the trustee a condition of his paying the note. He merely says that he feels that it is only proper that such application should be made before he pays the note. But even if he did make it a condition it would make no difference, for plaintiff would not have to wait forever to receive more money from the maker of the note (it did wait two years and three months, which was certainly much more than a reasonable time, which is all that it would have to wait) and it appears that plaintiff never did receive anything more on the note since the defendant, on whom, as this Court well knows, rested the burden of proving payment, did not prove that anything more had been paid on the note than the sum of \$993.21, which the complaint alleges, such allegation not being denied by the answer, was paid on May 15, 1918, such date being long prior to defendant's said letter of December 11, 1918. Therefore, even if the application of the amount received from the maker were a condition, the condition was fulfilled, because nothing was received.

Nor can it be said that defendant in his said letter is merely acknowledging the note to the extent of the amount the letter of the plaintiff of November 19, 1918, offered to take. The defendant's letter does not even intimate such a thing. Even if it did, however, it would cut no figure, for a debtor can acknowledge part of a debt and the acknowledgment will be good as to the part. See

Oliver v. Gray, 1 Harr. & G. (Md.) 204.

But, to repeat, there is nothing in the defendant's letter to indicate that he intended to acknowledge his liability for only part of the note. The letter refers to the note generally, and not to any partial liability upon it and when the defendant speaks about paying he does not say a word about paying only a portion. It is clear that when the defendant acknowledges the note he acknowledges his liability for the whole of it and not merely for a part. But if this Court should think that the phraseology of the letter is at all doubtful upon this point it must resolve such doubt in favor of plaintiff and hold that the letter intends to acknowledge the note as a whole, because, as we have said before, this is an appeal from a judgment of nonsuit and every doubt upon the evidence must be resolved in favor of the plaintiff. From this letter of defendant it is, at most, slightly doubtful whether defendant was referring to his willingness to pay the whole of the note or the portion thereof that the plaintiff had offered to take.

It is evident that this letter is alone ample to constitute an acknowledgment sufficient to toll the statute of limitations. And so, the subsequent letters may be eliminated from consideration. Defendant contends that in these subsequent letters, the first of which was written eight months after defendant's said letter of December 11, 1918, defendant merely offered to pay a part of the note. But even if he did, what difference would it make? He could not in this manner nullify or affect in any way the previous unqualified acknowledgment of

the note made in his said letter of December 11, 1918.

And if we turn back from the decisions to the law itself, we find that it (360, C. C. P.) reads:

“No acknowledgment or promise is sufficient evidence of a new or continuing contract unless in some writing”, etc.

The lawmakers intended to separate distinctly the acknowledgment from the promise. It is not according to the law that there must be an acknowledgment *and also a promise*. Confusion in argument has arisen over the failure to clearly point this out. *If the writing contains any statement of debtor's unwillingness to pay, it does not amount to an acknowledgment*. But if the writing does not contain any statement of unwillingness to pay, it amounts to an acknowledgment and such an acknowledgment *or* a promise will bind the debtor. Some Courts seem to have confused these two which the law clearly seeks to separate. The question is always—was there an acknowledgment *or* a promise? Here we have an acknowledgment sufficient to raise an implied promise to pay because it contains no expression showing an unwillingness to pay. Treating the indebtedness as subsisting amounts to an unqualified acknowledgment.

Our contentions are upheld by Justice Hunt in his dissenting opinion in our case, where he says that the letters written by the defendant, especially those dated December 11, 1918, and November 26, 1918, acknowledged the indebtedness and treated it

as a subsisting one, thereby constituting a sufficient acknowledgment to take the debt out of the statute of limitations. This is, we respectfully submit, the correct rule and is the rule laid down in the above mentioned case of *Southern Pacific Company v. Prosser*, where, as we have said before, although the acknowledgment was much weaker than the one in our case, yet the Supreme Court of California held it to be sufficient. That rule is, that where the writing is made prior to the running of the statute of limitations, which is, of course, the situation in our case, and the writing treats the obligation as binding upon defendant, it is not necessary that it say a word about payment. In our case the defendant's letter goes further and in addition to acknowledging the indebtedness expresses a willingness and intent to pay. Therefore, the acknowledgment in our case is more than sufficient and the judgment of non-suit was erroneous.

We have been compelled to extend this petition to considerable length as we feel, with all due respect to this Court, not only that the prevailing opinion of this Court incorrectly interprets the *Clunin* case and the law of the State of California as declared by the *Clunin* case and by other decisions of its Supreme Court but that if said prevailing opinion is allowed to stand a great injustice will be done the plaintiff. If it stands a debtor can write to the creditor and acknowledge the debt and say also that he is willing to pay and intends to pay and then turn around and defeat the creditor on

the ground that the debt is outlawed. It is respectfully submitted that this is not just and that, therefore, a rehearing should be granted us.

Dated, San Francisco,
May 16, 1923.

Respectfully submitted,
WILLARD P. SMITH,
MARK J. WOOLEY,
*Attorneys for Plaintiff in Error
and Petitioner.*

WALTON C. WEBB,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
May 16, 1923.

WILLARD P. SMITH,
*Of Counsel for Plaintiff in Error
and Petitioner.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error,
vs.

J. B. DANIEL,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

FILED
AUG 21 1922
F. D. MONGKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error,
vs.

J. B. DANIEL,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Nevada.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Affidavit of Service of Copy of Writ of Error..	255
Amended Complaint (Bill of Exceptions).....	24
Answer	6
Answer (Bill of Exceptions).....	18
Answer to Amended Complaint (Bill of Ex- ceptions)	30
Answers to Interrogatories to Mrs. R. H. Beale	335
Answers to Interrogatories Propounded to Elizabeth A. Rodgers, for Defendant....	217
Answers to Interrogatories Propounded to Millie L. Rodgers, for Defendant.....	183
Argument on Motion for New Trial.....	325
Assignment of Errors.....	268
Bill of Exceptions.....	12
Bill of Exceptions Presented and Ordered Amended	327
Bill of Exceptions Presented and Testimony Therein Ordered Reduced.....	326
Bond on Writ of Error.....	264
Certificate and Return to Interrogatories and Cross-Interrogatories.....	329

Index.	Page
Certificate of Clerk U. S. District Court to Transcript of Record.....	352
Certification of Exceptions to Order of Court Rejecting a Portion of Defendant's Bill of Exceptions	289
Citation on Writ of Error (Original).....	356
Complaint	1
Complaint (Bill of Exceptions).....	13
Exceptions of Defendant to Rulings of Court on Settlement of Bill of Exceptions.....	298

EXHIBITS:

Defendant's Exhibit "A"—Check No. 364—Dated July 28, 1919, Elizabeth A. Rodgers to Lovelock Mercantile Bank- ing Company.....	150
Defendant's Exhibit "B"—Check No. 358— Dated July 28, 1919, Elizabeth A. Rodgers to Lovelock Mercantile Bank- ing Company	151
Defendant's Exhibit "C"—Check No. 359— Dated July 28 1919, Elizabeth A. Rodgers to Lovelock Mercantile Bank- ing Company.....	152
Defendant's Exhibit "D"—Check No. 360— Dated July 28, 1919, Elizabeth A. Rodgers to Lovelock Mercantile Bank- ing Company	152
Defendant's Exhibit "E"—Check No. 361— Dated July 28, 1919, Elizabeth A. Rodgers to Lovelock Mercantile Bank- ing Company.....	153

Index.

Page

EXHIBITS—Continued:

Defendant's Exhibit "F"—Check No. 363— Dated July 28, 1919, Elizabeth A. Rodgers to Lovelock Mercantile Bank- ing Company.....	153
Defendant's Exhibit "G"—Check No. 358a—Dated July 28, 1919, Elizabeth A. Rodgers to Lovelock Mercantile Banking Company.....	154
Interrogatories Propounded to Elizabeth A. Rodgers, for Defendant.....	214
Interrogatories Propounded to Millie L. Rodgers	181
Interrogatories Propounded to Mrs. R. H. Beale, for Defendant.....	332
Judgment	233
Memorandum of Exceptions Relied upon on Motion for a New Trial.....	236
Minutes of Court—May 3, 1920—Order Contin- uing for Term.....	311
Minutes of Court—October 4, 1920—Order Con- tinuing for Term.....	311
Minutes of Court—January 3, 1921,—Order Setting Case for Trial—January 24, 1921..	312
Minutes of Court—January 22, 1921—Order Vacating and Setting for Trial—February 9, 1921.....	312
Minutes of Court—February 7, 1921—Order Va- cating Setting for Trial February 9, 1921.	313
Minutes of Court—April 4, 1921—Order Set- ting Case for Trial May 9, 1921.....	313

Index.	Page
Minutes of Court—April 30, 1921—Order Setting Case for Trial May 9, 1921.....	314
Minutes of Court—May 12, 1921—Order Vacating Setting for Trial May 9, 1921.....	314
Minutes of Court—May 16, 1921—Order Setting for Trial May 23, 1921.....	315
Minutes of Court—May 19, 1921—Trial Continued to May 26, 1921.....	315
Minutes of Court—May 23, 1921—Trial Continued to June 1, 1921.....	316
Minutes of the Court—June 1, 1921—Trial....	316
Minutes of Court—June 2, 1921—Trial (Continued)	318
Minutes of Court—June 3, 1921—Trial (Continued)	319
Minutes of Court—June 4, 1921—Trial (Continued) and Verdict.....	321
Minutes of Court—June 8, 1921—Motion Allowing Defendant Until Latter Part of July to File Papers on Appeal.....	322
Minutes of Court—June 13, 1921—Order Allowing to and Including July 25, 1921, to File Papers on Appeal.....	323
Minutes of Court—July 22, 1921—Order Allowing to and Including August 25, 1921, to File Papers on Appeal.....	323
Minutes of Court—August 24, 1921—Order Allowing Defendant Five Days After Court Rules on Defendant's Motion for New Trial Within Which to File Bill of Exceptions	324

Index.	Page
Minutes of Court—December 3, 1921—Argument on Motion for New Trial.....	325
Minutes of Court—December 22, 1921—Order Denying Motion for New Trial.....	325
Minutes of Court—January 24, 1922—Bill of Exceptions Presented and Testimony Therein Ordered Reduced.....	326
Minutes of Court—February 7, 1922—Bill of Exceptions Presented and Ordered Amended	327
Minutes of Court—February 8, 1922—Order Approving Bill of Exceptions.....	328
Minutes of Court—March 9, 1922—Order Extending Time Thirty Days to File Record and Docket Cause.....	329
Motion Allowing Defendant Until Latter Part of July to File Papers on Appeal.....	322
Names and Addresses of Attorneys of Record	1
Notice of Intention to Move for a New Trial..	235
Opinion on Motion for New Trial.....	300
Order Allowing Defendant Five Days After Court Rules on Defendant's Motion for New Trial Within Which to File Bill of Exceptions	324
Order Allowing to and Including July 25, 1921, to File Papers on Appeal.....	323
Order Allowing to and Including August 25, 1921, to File Papers on Appeal.....	323
Order Allowing Writ of Error.....	253
Order Approving Bill of Exceptions.....	328
Order Continuing for Term—May 3, 1920.....	311

Index.	Page
Order Continuing for Term—October 4, 1920..	311
Order Denying Motion for New Trial.....	325
Order Enlarging Time Thirty Days to File Record and Docket Cause.....	351
Order Extending Time Thirty Days to File Record and Docket Cause.....	329
Order Extending Time to Prepare, Serve and File Bill of Exceptions—Dated June 13, 1921.....	261
Order Extending Time to Prepare, Serve and File Bill of Exceptions—Dated July 22, 1921	260
Order Extending Time to Prepare, Serve and File Bill of Exceptions—Dated August 24, 1921.....	259
Order Setting Case for Trial—January 24, 1921	312
Order Setting Case for Trial, May 9, 1921—April 4, 1921.....	313
Order Setting Case for Trial May 9, 1921—April 30, 1921.....	314
Order Setting for Trial May 23, 1921.....	315
Order Staying Execution.....	262
Order Staying Proceedings Pending Error Proceedings	257
Order Vacating and Setting for Trial—February 9, 1921—January 22, 1921.....	312
Order Vacating Setting for Trial—February 9, 1921—February 7, 1921.....	313
Order Vacating Setting for Trial May 9, 1921.	314

Index.	Page
Petition for Writ of Error.....	256
Praecipe for Transcript of Record.....	349
Reply (Bill of Exceptions).....	35
Stipulation Fixing Time to Prepare and File	
Bill of Exceptions.....	254
Stipulation for Taking Deposition.....	331
Stipulation Re Amended Answer, etc.....	251
Stipulation Re Filing of Amended Complaint..	250
Stipulation Staying Execution of Judgment..	263
Stipulation to Take Deposition De Bene Esse.	337
Stipulation to Take Deposition De Bene Esse	
of Hazel Zunini.....	348
Stipulation to Take Deposition De Bene Esse	
of W. F. Crawford.....	346
TESTIMONY ON BEHALF OF PLAIN-	
TIFF:	
CRAWFORD, Dr. WILLIAM F.....	128
Cross-examination	134
Redirect Examination.....	140
DANIEL, J. B.....	38
Cross-examination.....	58
Redirect Examination	94
Recross-examination.....	100
Recalled	141
In Rebuttal.....	227
DARRAH, Mrs. CORA F.....	103
KINGSBURY, Dr. WILLIAM NEAVE..	112
Cross-examination.....	125
Redirect Examination.....	127
Recross-examination.....	128

Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TUFF—Continued:	
McCULLOUGH, W. R.....	107
Cross-examination.....	108
MEFFLEY, JAMES A.....	103
NIXON, Mrs. ADA (In Rebuttal).....	222
Cross-examination.....	225
DEPOSITIONS ON BEHALF OF DE- FENDANT:	
RODGERS, MILLIE L.....	180
ZUNINI, HAZEL.....	338
Cross-examination	344
TESTIMONY ON BEHALF OF DEFEND- ANT:	
DARRAH, Mrs. CORA F.....	177
Cross-examination.....	179
DAVIS, FRED	168
Cross-examination	172
Redirect Examination.....	176
Recross-examination.....	176
FLICK, Mrs. WARREN B.....	176
MACLEAN, Dr. DONALD.....	194
Cross-examination	201
Redirect Examination	207
Recross-examination	208
McCULLOUGH, W. R.....	144
Cross-examination	157
Redirect Examination.....	167
Cross-examination	168
RODGERS, Mrs. ELIZABETH A.....	212

Index.	Page
Trial	316
Trial (Continued)	318
Trial (Continued)	319
Trial (Continued) and Verdict.....	321
Trial Continued to May 26, 1921.....	315
Trial Continued to June 1, 1921.....	316
Verdict	232
Waiver of Right to Propound Cross-Interroga- tories	334
Writ of Error (Original)	354

Names and Addresses of Attorneys of Record.

BOOTH B. GOODMAN, Esq., of Lovelock, Nevada,
and ROBERT RICHARDS, Esq., of Carson
City, Nevada,

For Plaintiff and Defendant in Error.

W. M. KEARNEY, Esq., and Messrs. CANTWELL
& SPRINGMEYER, of Reno, Nevada, and
JOHN E. BENNETT, Esq., 246 Russ Building,
San Francisco, California,

For Defendant and Plaintiff in Error.

[1*]

In the Sixth Judicial District Court of the State of
Nevada, in and for the County of Pershing.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS, Also Known as MILLIE R.
EVANS and MALVINA EVANS,

Defendant.

Complaint.

The plaintiff complains of the defendant and for
cause of action alleges:

FIRST.

On information and belief, that the defendant is
not a resident of the State of Nevada, but resides in
the City and County of San Francisco, State of
California.

*Page-number appearing at foot of page of original certified
Transcript of Record.

SECOND.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, named and known as Fourth Street.

THIRD.

That the defendant was then and there the owner of a certain Ford automobile which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant, and in possession of said automobile as the servant of defendant and driving and operating the same under defendant's direction and control and in the course of his employment.

FOURTH.

That defendant's said servant so negligently and carelessly drove, managed and operated said automobile, that he wilfully and negligently drove said automobile into and against plaintiff with [2] great violence. That the impact with said automobile knocked plaintiff to the ground and said servant then and there drove said automobile over and across plaintiff's body.

FIFTH.

That at the time stated the said servant was driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part.

SIXTH.

That plaintiff is informed and believes, and therefore alleges that the said servant, namely Fred Davis was, at the times herein mentioned under the age of sixteen years, to wit, of the age of fourteen years, and was permitted by said defendant to drive said automobile in violation of the statute in such case made and provided, and especially that certain act, approved March 24th, 1915, entitled "An Act regulating automobiles or motor vehicles on public roads, highways, park or parkways, streets and avenues within the State of Nevada, providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner and repealing an Act of the same title approved March 24, 1913," and the Acts amendatory thereto. That said Fred Davis was incompetent to drive said automobile.

SEVENTH.

That by reason of the force and violence of said automobile running into and over plaintiff, plaintiff became and was then and there badly hurt, bruised, wounded and injured in various parts of his body and particularly about the thighs, arms, back, neck and abdomen, and said plaintiff became and was sick, sore, lame, crippled and disordered and has so remained since the said injury and still continues to remain sick, crippled, lame and disordered, and has suffered and underwent great pain, and still continues to suffer great pain and

mental anguish. That in addition to other and numerous [3] physical injuries plaintiff has, on account of the injuries complained of, suffered, and still continues to suffer from nervous disorders, which have resulted in plaintiff being unable to properly sleep or rest. That plaintiff is advised and believes that his injuries are permanent and that he will continue to suffer from nervous disorders and other pain resulting from his said injuries for a long period of time to come and during the remainder of his natural life.

EIGHTH.

That as a result of said injuries plaintiff has been required to spend divers large sums of money for medical treatment and treatment for his nervous condition and for such purposes has already expended the sum of \$109.70, and the suit of clothes which plaintiff wore at the time of receiving the injuries complained of were then and there ruined by the blows from said automobile. That said suit of clothes was reasonably worth the sum of \$30.00 before the said time of receiving said injuries.

NINTH.

That since the said accident plaintiff has been unable by reason of the injuries received, to attend to his business affairs. That plaintiff is a rancher and manager of a large ranch in Lovelock Valley. That plaintiff is also a geologist and mining expert and before the said injuries were received was able and capable of earning large sums of money in both said business and profession.

TENTH.

That plaintiff's general health has been greatly and generally impaired and broken by reason of the said injuries, and, upon information and belief, that his health will continue to be impaired as a direct result of said injuries.

ELEVENTH.

That by reason of the matter hereinbefore alleged, and the negligence of the said defendant and her said servant this plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE Plaintiff prays judgment against the said defendant for said sum of Fifteen Thousand (\$15,000.00) Dollars, together with [4] his costs and disbursements in this action.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

Address: Lovelock, Nevada.

State of Nevada,

County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 30th day of August, 1919.

BOOTH B. GOODMAN,

Notary Public.

Filed Aug. 30, 1919. J. H. Causten, Clerk.

No. 2270. Filed Decemr. 9th, 1919. T. J. Edwards, Clerk U. S. Dist. Court, Dist. of Nevada.
[5]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answer.

Now comes the defendant, and answering unto
the complaint of plaintiff herein, for answer says:

I.

Defendant admits the matters and things in the
first paragraph of the complaint stated.

II.

Defendant denies that on the 28th day of July,
1919, or at any time, or at all, plaintiff was law-
fully walking across a public street and thorough-
fare of the city of Lovelock, county of Pershing,
State of Nevada, named and known as Fourth
Street, or was walking across said street in any
manner, or at all, except in an unlawful, careless,
negligent, and indifferent manner.

III.

Defendant admits the matters and things in the
third paragraph of plaintiff's complaint contained.

IV.

Defendant denies that her said servant drove the said automobile into or against plaintiff, or with great violence, or at all. Denies that he negligently or carelessly drove the said automobile or managed or operated the said automobile, or that he wilfully, or otherwise, or at all, or negligently, or otherwise, or at all, drove the said automobile into or against plaintiff with great violence, or any violence, or at all. Denies that the impact with said automobile knocked plaintiff to the ground, or elsewhere, or at all; and denies that defendant's said servant inflicted upon plaintiff any impact [6] by said machine, or otherwise, or at all, and denies that said servant then and there drove said automobile over, or across, plaintiff's body or did so drive at any time, whatsoever.

V.

Denies that at the time stated in said complaint, or at any time, or at all, defendant's said servant was driving said automobile at an unreasonable, or dangerous, or excessive rate of speed, or in a negligent, or careless, or dangerous manner; but alleges that said servant was then and there, and at all times in said complaint mentioned, driving said automobile when the same was driven by said servant, in a cautious and lawful and careful manner and at a low rate of speed; and denies that plaintiff was at all or any of the times mentioned in the said complaint exercising due care, or any care, or caution, on his part, but alleges that plaintiff's manner was grossly careless and incautious, and that the alleged acci-

dent in said complaint complained of was precipitated and occasioned through the negligence of plaintiff.

VI.

Denies that the defendant's said servant, Fred Davis, was incompetent to drive the said automobile, and avers that the said servant, Fred Davis, was, and is, a competent, cautious, and careful driver of said automobile, and experienced in driving the same; and defendant denies, on her information and belief, that the said Fred Davis was of the age of fourteen years, or was under the age of sixteen years; and denies that he was permitted by defendant to drive said automobile in violation of the Act of March 24th, 1913, as in said complaint set forth, entitled "An Act Regulating Automobiles Within the State of Nevada," and Acts amendatory thereof, or of any other Act or Acts of the State of Nevada, whatsoever.

VII.

Denies that by reason of the force and violence, or force or violence, of said automobile running into, or over, plaintiff, plaintiff became or was then and there, or at any time badly hurt, or hurt at all, or bruised or wounded, or injured, in various, or any, parts [7] of his body, or at all, or particularly, or otherwise, about the thighs, or arms, or back, or neck, or abdomen, or elsewhere, or at all; denies that plaintiff became, or was sick, or sore, or lame, or crippled, or disordered, and denies that he has so remained since said alleged injury, or that plaintiff was injured in any way, or at all, by said

automobile, or by defendant's said servant, and denies that plaintiff has so remained since said alleged injury, or that he suffered any injury; and denies that he still continues to remain sick, or crippled, or lame, or disordered; and denies that he has suffered, or underwent great or any pain, or mental anguish, or any anguish. Denies that on account of the injuries complained of, or that there were any such injuries, plaintiff suffered, or still continues to suffer, from nervous disorders, or any disorders, or that they have resulted in plaintiff being unable to properly, or in any manner, sleep, or rest. Denies that plaintiff is advised, or believes, that such injuries are permanent, or that they are permanent, or that plaintiff has any ground whatever for believing them to be permanent, or that there were any such injuries as plaintiff describes, or at all; and denies that he is advised, or believes, that by reason of said alleged injuries plaintiff will continue to suffer from nervous disorders, or any disorders, or other, or any, pain resulting from said injuries for a long, or any, period of time, or at all, or that he suffers from nervous, or any, disorders or pain therefrom.

VIII.

Denies that as a result of said alleged injuries plaintiff has been required to spend divers, or any, large, or any, sums of money for medical treatment, or treatment, for his nervous condition, or any other condition, and denies that for such purpose he has already expended the sum of \$109.70, or any other sum or sums; and denies that the suit of clothes

which plaintiff wore at the time of receiving the alleged injuries complained of were ruined or injured by the alleged blows received from said automobile, or that plaintiff received any blow, or blows, from said automobile. [8]

IX.

Denies that since the said alleged accident plaintiff has been unable, by reason of the injuries received, to attend to his business affairs. Defendant alleges that she has no information or belief upon which to answer the allegation that plaintiff is a rancher, or manager, of a large ranch in Lovelock Valley, or elsewhere, also that plaintiff is a geologist and mining expert; hence, denies the same; and denies that before said alleged injuries were received, and denies that any injuries whatever were received, plaintiff was able or capable of earning large sums, or any sums, of money in both, or either, of said businesses or professions; and avers that plaintiff has been in any manner incapacitated or disabled in the performance of any business he might have been able to do prior to said alleged accident, by reason of said alleged accident; and avers that plaintiff was not injured by said alleged accident.

X.

Denies that plaintiff's general health has been greatly, or generally, impaired, or broken, by reason of the said alleged injuries, and denies that upon information or belief, or at all, or that plaintiff has any such information or belief, that his health will continue to be impaired as a direct result of said

alleged injuries, or as any result thereof, or that his health will be so impaired in consequence of such alleged injuries, or that there were any injuries.

XI.

Denies that by reason of any matters in the complaint alleged, or the negligence of defendant, or of her said servant, plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars, or of any sum whatsoever, or at all.

WHEREFORE, defendant having answered unto the complaint herein, prays that she may be hence dismissed with her proper costs.

W. M. KEARNEY and
JOHN E. BENNETT,
Solicitors for Defendant. [9]

State of California,
City and County of San Francisco,—ss.

Millie L. Evans being first duly sworn, deposes and says: She is the defendant in the above-entitled action; that she has read the answer herein and knows the contents thereof and the same is true of her own knowledge, except as therein stated on her information or belief and as to those facts she believes it to be true.

MILLIE L. RODGERS,
Formerly Millie L. Evans.

Subscribed and sworn to this 6th day of December, 1919, before me.

[Seal] E. J. CASEY,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Answer. Filed Decr. 20th, 1919. T. J. Edwards, Clerk. William M. Kearney and John E. Bennett, Reno, Nevada, Attorneys for Defendant.

No. 2270. U. S. Dist. Court, Dist. of Nevada. Daniel vs. Evans. Plffs. Ex. No. 22. Fided June 2, 1921. E. O. Patterson, Clerk. [10]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that this action was originally commenced in the District Court of the State of Nevada, in and for the County of Pershing, by the issuance of a summons dated August 30, 1919, which, together with a copy of the complaint, was served on the defendant Millie L. Evans (now Millie L. Jones), on or about October 29, 1919, who thereafter and on or about the 28th day of November, 1919, duly appeared by W. M. Kearney and John E. Bennett, her attorneys. Thereafter and on or about the 6th day of December, 1919, this action

was duly removed to the United States District Court for the District of Nevada on petition and motion of the defendant, setting up the grounds of diversity of citizenship; that thereafter and on or about the 20th day of December, 1919, an answer was duly filed and served upon the plaintiff; that thereafter and on or about the 4th day of February, 1921, the plaintiff served upon the defendant and filed with the Clerk of the above-entitled court his amended complaint; that thereafter on or about the 14th day of February, 1921, the defendant filed her answer to the amended complaint and served a copy thereof upon the plaintiff's attorney; that thereafter, to wit, on or about the 24th day of February, 1921, the plaintiff filed his reply to defendant's answer to the amended complaint and served a copy upon defendant's attorney.

The original and amended pleadings in the cause herein are as follows: [11]

In the Sixth Judicial District Court of the State of Nevada, in and for the County of Pershing.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS, also Known as MILLIE R.
EVANS and MALVINA EVANS,

Defendant.

Complaint.

The plaintiff complains of the defendant and for cause of action alleges:

FIRST.

On information and belief, that the defendant is not a resident of the State of Nevada, but resides in the City and County of San Francisco, State of California.

SECOND.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, named and known as Fourth Street.

THIRD.

That the defendant was then and there the owner of a certain Ford automobile which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant, and in possession of said automobile as the servant of defendant and driving and operating the same under defendant's direction and control and in the course of his employment.

FOURTH.

That defendant's said servant so negligently and carelessly drove, managed and operated said automobile, that he wilfully and negligently drove said automobile into and against plaintiff with great violence. That the impact with said automobile knocked plaintiff to the ground and said servant then and there drove said automobile [12] over and across plaintiff's body.

FIFTH.

That at the time stated the said servant was

driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part.

SIXTH.

That plaintiff is informed and believes, and therefore alleges that the said servant, namely Fred Davis, was, at the times herein mentioned under the age of sixteen years, to wit, of the age of fourteen years, and was permitted by said defendant to drive said automobile in violation of the statute in such case made and provided, and especially that certain Act, approved March 24th, 1915, entitled "An Act regulating automobiles or motor vehicles on public roads, highways, park or parkways, streets and avenues within the State of Nevada; providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner and repealing an Act of the same title approved March 24, 1913," and the Acts amendatory thereto. That said Fred Davis was incompetent to drive said automobile.

SEVENTH.

That by reason of the force and violence of said automobile running into and over plaintiff, plaintiff became and was then and there badly hurt, bruised, wounded and injured in various parts of his body and particularly about the thighs, arms, back, neck and abdomen, and said plaintiff became

and was sick, sore, lame, crippled and disordered and has so remained since the said injury and still continues to remain sick, crippled, lame and disordered, and has suffered and underwent great pain, and still continues to suffer great pain and mental anguish. That in addition to other and numerous physical injuries plaintiff has, on account of the injuries complained of, suffered, and still continues to suffer from nervous disorders, which have resulted in plaintiff being unable to properly sleep or [13] rest. That plaintiff is advised and believes that his injuries are permanent and that he will continue to suffer from nervous disorders and other pain resulting from his said injuries for a long period of time to come and during the remainder of his natural life.

EIGHTH.

That as a result of said injuries plaintiff has been required to spend divers large sums of money for medical treatment and treatment for his nervous condition, and for such purposes has already expended the sum of \$109.70, and that the suit of clothes which plaintiff wore at the time of receiving the injuries complained of were then and there ruined by the blows from said automobile. That said suit of clothes was reasonably worth the sum of \$30.00 before the said time of receiving said injuries.

NINTH.

That since the said accident plaintiff has been unable by reason of the injuries received, to attend to his business affairs. That plaintiff is a rancher

and manager of a large ranch in Lovelock Valley. That plaintiff is also a geologist and mining expert and before the said injuries were received was able and capable of earning large sums of money in both said business and profession.

TENTH.

That plaintiff's general health has been greatly and generally impaired and broken by reason of the said injuries, and, upon information and belief, that his health will continue to be impaired as a direct result of the said injuries.

ELEVENTH.

That by reason of the matters hereinbefore alleged, and the negligence of the said defendant and her said servant this plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE Plaintiff prays judgment against the said defendant for said sum of Fifteen Thousand (\$15,000.00) Dollars, together with his costs and disbursements in this action.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

Address: Lovelock, Nevada. [14]

State of Nevada,

County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge excepting as to matters therein stated upon information

and belief, and as such matters he believes it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 30th day of August, 1919.

[Seal]

BOOTH B. GOODMAN,
Notary Public.

I hereby certify that the foregoing is a full, true and correct copy of the complaint filed in the above-entitled action.

BOOTH B. GOODMAN.

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answer.

Now comes the defendant, and answering unto the complaint of plaintiff herein, for answer says:

I.

Defendant admits the matters and things in the first paragraph of the complaint stated.

II.

Defendant denies that on the 28th day of July, 1919, or at any time, or at all, plaintiff was lawfully walking across a public street and thoroughfare in the city of Lovelock, County of Pershing, [15]

State of Nevada, named and known as Fourth Street, or was walking across said street in any manner, or at all, except in an unlawful, careless, negligent, and indifferent manner.

III.

Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained.

IV.

Defendant denies that her said servant drove the said automobile into or against plaintiff, or with great violence, or at all. Denies that he negligently or carelessly drove the said automobile, or managed or operated the said automobile, or that he wilfully, or otherwise, or at all, or negligently, or otherwise, or at all, drove the said automobile into or against plaintiff with great violence, or any violence, or at all. Denies that the impact with said automobile knocked plaintiff to the ground, or elsewhere, or at all; and denies that defendant's said servant inflicted upon plaintiff any impact by said machine or otherwise, or at all, and denies that said servant then or there drove said automobile over, or across plaintiff's body, or did so drive at any time, whatsoever.

V.

Denies that at the time stated in said complaint, or at any time, or at all, defendant's said servant was driving said automobile at an unreasonable, or dangerous or excessive rate of speed, or in a negligent, or careless, or dangerous manner; but alleges that said servant was then and there, and at all times in said complaint mentioned, driving

said automobile, when the same was driven by said servant, in a cautious and lawful and careful manner and at a low rate of speed; and denies that plaintiff was at all or any of the times mentioned in the said complaint exercising due care, or any care, or caution, on his part, but alleges that plaintiff's manner was grossly careless and incautious, and that the alleged accident in said complaint complained of was precipitated and occasioned through the negligence of plaintiff. [16]

VI.

Denies that the defendant's said servant, Fred Davis, was incompetent to drive the said automobile, but avers that the said servant, Fred Davis, was, and is, a competent, cautious, and careful driver of said automobile, and experienced in driving the same; and defendant denies, on her information and belief, that the said Fred Davis was of the age of fourteen years, or was under the age of sixteen years; and denies that he was permitted by defendant to drive said automobile in violation of the Act of March 24th, 1913, as in said complaint set forth, entitled "An Act Regulating Automobile within the State of Nevada," and Acts amendatory thereof, or of any other Act or Acts of the State of Nevada, whatsoever.

VII.

Denies that by reason of the force and violence, or force or violence, of said automobile running into, or over, plaintiff, plaintiff became or was then or there, or at any time, badly hurt, or hurt at all,

or bruised, or wounded, or injured, in various, or any, parts of his body, or at all, or particularly, or otherwise, about the thighs, or arms, or back, or neck, or abdomen, or elsewhere, or at all; denies that plaintiff became, or was, sick, or sore, or lame, or crippled, or disordered, and denies that he has so remained since said alleged injury, or that plaintiff was injured in any way, or at all, by said automobile, or by defendant's said servant, and denies that plaintiff has so remained since said alleged injury, or that he suffered any injury; and denies that he still continues to remain sick, or crippled, or lame, or disordered; and denies that he has suffered, or underwent great or any pain, or mental anguish, or any anguish. Denies that on account of the injuries complained of, or that there were any such injuries, plaintiff suffered, or still continues to suffer, from nervous disorders, or any disorders, or that they have resulted in plaintiff being unable to properly, or in any manner, sleep, or rest. Denies that plaintiff is advised, or believes, that such injuries are permanent, or that they are permanent, or that plaintiff has any ground whatever for believing them to be permanent, or that there were any such injuries as plaintiff describes [17] or at all; and denies that he is advised, or believes, that by reason of said alleged injuries plaintiff will continue to suffer from nervous disorders, or any disorders, or other, or any, pain resulting from said injuries for a long, or any, period of time, or at all, or that he suffers from nervous or any disorders or pain therefrom.

VIII.

Denies that as a result of said alleged injuries plaintiff has been required to spend divers, or any, large, or any, sums of money for medical treatment, or treatment, for his nervous condition, or any other condition, and denies that for such purposes he has already expended the sum of \$109.70, or any other sum or sums; and denies that the suit of clothes which plaintiff wore at the time of receiving the alleged injuries complained of were ruined or injured by the alleged blows received from said automobile, or that plaintiff received any blow, or blows, from said automobile.

IX

Denies that since the said alleged accident plaintiff has been unable, by reason of the injuries received, to attend to his business affairs. Defendant alleges that she has no information or belief upon which to answer the allegation that plaintiff is a rancher, or manager, of a large ranch in Lovelock Valley, or elsewhere, also that plaintiff is a geologist and mining expert; hence, denies the same; and denies that before said alleged injuries were received, and denies that any injuries whatever were received, plaintiff was able or capable of earning large sums, or any sums, of money in both, or either of said businesses or professions; and avers that plaintiff has been in no manner incapacitated or disabled in the performance of any business he might have been able to do prior to said alleged accident, by reason of said alleged accident; and avers that plaintiff was not injured by said alleged accident.

X.

Denies that plaintiff's general health has been greatly, or generally, impaired, or broken, by reason of the said alleged injuries, and denies that upon information or belief, or at all, or [18] that plaintiff has any such information or belief, that his health will continue to be impaired as a direct result of said alleged injuries, or as any result thereof, or that his health will be so impaired in consequence of such alleged injuries, or that there were any injuries.

XI.

Denies that by reason of any matters in the complaint alleged, or the negligence of defendant, or of her said servant, plaintiff has been damaged in the sum of fifteen thousand (\$15,000.00) dollars, or of any sum whatsoever, or at all.

WHEREFORE, Defendant having answered unto the complaint herein, prays that she may be hence dismissed with her proper costs.

JOHN E. BENNETT,
W. M. KEARNEY,
Solicitors for Defendant.

State of California,
City and County of San Francisco,—ss.

Millie L. Evans, being first duly sworn, deposes and says: She is the defendant in the above-entitled action; that she has read the answer herein and knows the contents thereof and the same is true of her own knowledge, except as therein stated on

her information or belief and as to those facts she believes it to be true.

MILLIE L. RODGERS,
Formerly Millie L. Evans.

Subscribed and sworn to this 6th day of December, 1919, before me.

E. J. CASEY,
Notary Public in and for the City and County of
San Francisco, State of California.

I, W. M. Kearney, one of the solicitors for the defendant in the above-entitled matter, do hereby certify that the foregoing is a full, true and correct copy of defendant's answer filed in the above-entitled matter on the —— day of December, 1919.

W. M. KEARNEY. [19]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Amended Complaint.

The plaintiff complains of the defendant and for cause of action alleges:

FIRST.

That the defendant is and at all times hereinafter mentioned was the owner of those certain ranches situated in Pershing County, Nevada,

known as "Reservation" ranches or "Rodgers" ranches.

SECOND.

That at the times hereinafter mentioned one Fred Davis was then and there a servant in the employ of the said defendant and whose duty embraced the business of conveying employees and workmen to and from the ranches of the defendant to the city of Lovelock and conveying supplies and messages between the said city of Lovelock and said defendant's ranches. That in the course of his employment the said Fred Davis used and was in possession of an automobile furnished to him by defendant and the property of the defendant, and which automobile he was, at the time hereinafter mentioned, operating in the regular course of his employment and under the direction and control of the said defendant through her duly authorized superintendent and ranch manager, W. R. McCulloch.

THIRD.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, then named and known as Fourth Street, but since named Main Street. That the defendant's said servant, Fred Davis, was at the same time and date and in the [20] course of his employment, on the said street and driving an automobile owned by the defendant as aforesaid.

FOURTH.

That defendant's said servant, Fred Davis, so

negligently and carelessly drove, managed and operated said automobile that he wilfully and negligently drove said automobile into and against plaintiff with great violence. That the impact with said automobile knocked plaintiff to the ground and said servant then and there drove said automobile over and across plaintiff's body.

FIFTH.

That at the time stated the said servant was driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part. That such rate of speed at which the said servant was driving the said automobile, at the time he drove the same upon and over plaintiff, was in excess of twelve miles per hour and in violation of Ordinance Number 4 of the City of Lovelock prohibiting the driving of motor vehicles upon the streets within the city limits and particularly the street mentioned at a rate of speed greater than twelve miles per hour.

SIXTH.

That plaintiff is informed and believes, and therefore alleges that the said servant, namely Fred Davis, was, at the times herein mentioned, under the age of sixteen years, to wit, of the age of fourteen years, and was permitted by said defendant to drive said automobile in violation of the statute in such case made and provided, and especially that certain Act, approved March 24th, 1915, entitled "An Act regulating automobile or motor vehicles

on public roads, highways, park or parkways, streets and avenues within the State of Nevada; providing a license for the operation thereof and prescribing penalties for its violation; designating the manner of handling the receipts therefrom and the purpose for which it may be expended and in what manner, and repealing an Act of the same title approved March 24, 1913'' and the Acts amendatory thereto. That said Fred Davis was incompetent to drive said automobile. [21]

SEVENTH.

That by reason of the force and violence of said automobile running into and over plaintiff, plaintiff became and was then and there badly hurt, bruised, wounded and injured in various parts of his body and particularly about the thighs, arms, back, neck and abdomen; and said plaintiff became and was sick, sore, lame, crippled and disordered and has so remained since the said injury and still continues to remain sick, crippled, lame and disordered, and has suffered and underwent great pain, and still continues to suffer great pain and mental anguish. That in addition to other and numerous physical injuries plaintiff has, on account of the injuries complained of, suffered, and still continues to suffer from nervous disorders, which have resulted in plaintiff being unable to properly sleep or rest. That plaintiff is advised and believes that his injuries are permanent and that he will continue to suffer from nervous disorders and other pain resulting from his said injuries for a long period of

time to come and during the remainder of his natural life.

EIGHTH.

That as a result of said injuries plaintiff has been required to spend divers large sums of money for medical treatment and treatment for his nervous condition and for such purposes has already expended the sum of \$432.21, and that the suit of clothes which plaintiff wore at the time of received the injuries complained of were then and there ruined by the blows from said automobile. That said suit of clothes was reasonably worth the sum of \$30.00 before the said time of receiving said injuries.

NINTH.

That since the said accident plaintiff has been unable by reason of the injuries received, to attend to his business affairs. That plaintiff is a rancher and manager of a large ranch in Lovelock Valley. That plaintiff is also a geologist and mining expert and before the said injuries were received was able and capable of earning large sums of money in both said business and profession.

TENTH.

That plaintiff's general health has been greatly and generally [22] impaired and broken by reason of the said injuries, and, upon information and belief, that his health will continue to be impaired as a result of the said injuries. That plaintiff's health has grown steadily worse since the said injury because of what plaintiff is informed and believes to be great and serious double lateral

curvatures of the spine and posterior and anterior curvatures of the spine and the displacement of other bones. That plaintiff has suffered therefrom a general decline in health attended by kidney and bladder troubles in addition to heart disturbances which have caused him weak and sick spells which have been recurring with greater and greater frequency.

ELEVENTH.

That by reason of the matters hereinbefore alleged, and the negligence of the said defendant and her said servant this plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE Plaintiff prays judgment against the said defendant for said sum of Fifteen Thousand (\$15,000.00) Dollars, together with his costs and disbursements in this action.

ROBT. RICHARDS and
BOOTH B. GOODMAN,
Attorneys for Plaintiff.
Address: Lovelock, Nevada.

State of Nevada,
County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing Amended Complaint and knows the contents thereof and the same is true of his own knowledge excepting as to matters therein stated upon information and belief, and as to such matters he believes it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 2d day of Feb. 1921.

[Seal]

BOOTH B. GOODMAN. [23]

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answer to Amended Complaint.

Comes now the defendant, and for answer to the amended complaint of plaintiff, admits, denies and alleges as follows:

I.

For answer to paragraph numbered "Second" of the complaint, defendant denies that at the times mentioned in the complaint, or at any other time, or at all, one Fred Davis was a servant in the employ of defendant; denies that in the course of his employment said Fred Davis used and was in the possession of, or used or was in the possession of, an automobile furnished to him by the defendant and the property of the defendant, or of an automobile furnished to him by the defendant, or which he was operating in the regular course of his employment and under the direction and control of defendant through her ranch superin-

tendent and ranch manager W. R. McCulloch, or which he was operating in any other manner under the direction or control of defendant.

II.

Answering paragraph numbered "Third" of plaintiff's complaint, defendant denies all the allegations in said paragraph contained save and except that at the time alleged in said paragraph Fred Davis was on the street therein named driving an automobile owned by defendant, and in this behalf defendant is informed and believes and therefore, on such information and belief, alleges the fact to be that plaintiff was then and there walking upon and across said street in an unlawful, careless, negligent and indifferent manner.

III.

The defendant denies all the allegations contained in paragraph [24] numbered "Fourth" of plaintiff's complaint.

IV.

With regard to the allegations contained in paragraphs numbered "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth" and "Eleventh," the defendant says that she has not knowledge or information upon which to base a belief, and therefore, basing her denial upon that ground, she denies all the allegations in each of the said paragraphs contained.

For further answer by way of new matter constituting a defense to plaintiff's complaint, defendant alleges.

I.

That defendant's true name is Millie L. Rodgers, and not Millie L. Evans, as entered in plaintiff's amended complaint.

II.

That in the month of July, 1919, defendant was the owner of those certain ranches situated in Pershing County, Nevada, known and described as the Reservation of Rodgers ranches, and of a Ford automobile driven and operated by one Fred Davis, who was an employee of said ranches. That the defendant was not then in the possession or control of said ranches or automobile, but the same were in the possession and under the control of Elizabeth A. Rodgers, the mother of this defendant, and said automobile was being driven and operated by said Fred Davis as the employee and agent of said Elizabeth A. Rodgers, all under an oral lease and agreement whereby said Elizabeth A. Rodgers had the possession, control and operation of said ranches and automobile, paying the defendant as rental therefor one-half ($\frac{1}{2}$) of the annual net proceeds derived from such possession, control and operation.

III.

That defendant is informed and believes, and upon such information and belief alleges the facts to be that on or about July 28, 1919, while said Fred Davis was driving said automobile in a lawful, cautious and careful manner and with the exercise of due and reasonable care upon and along the right side of a street in the City of Lovelock,

Pershing County, State of Nevada, then called and known as [25] Fourth Street but now called and known as Main Street, plaintiff did unlawfully, negligently, carelessly and recklessly and without due or any care or caution, walk diagonally across said street in the middle of the block and not upon a pedestrian's thoroughfare, and did so unlawfully, negligently, carelessly recklessly and without due or any care or caution, walk and cross in front of said automobile in such a manner that said Fred Davis could not in the exercise of due and reasonable care and caution prevent the said automobile from colliding with and striking said plaintiff, and that said automobile did then and there collide with and strike said plaintiff, although he, said plaintiff, had the last clear chance to escape said collision in that he could have avoided said car by looking around and stepping aside so as to let said automobile pass; that plaintiff sustained only minor injuries as a result of said collision, immediately afterwards walked away unaided, did not at any time suffer serious pain or injury therefrom, and was not damaged to any extent whatsoever thereby.

WHEREFORE, defendant prays judgment that plaintiff take nothing by his amended complaint, and that defendant be dismissed hence with her costs.

W. M. KEARNEY and
JOHN E. BENNETT,
Solicitors for Defendant.

State of California,

City and County of San Francisco,—ss.

Millie L. Rodgers, being first duly sworn, says: That she was formerly named Millie L. Evans and that she is defendant in the action entitled above; that she has read the above and foregoing amended answer; and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated on information or belief and as to them that she believes it to be true.

MILLIE L. RODGERS.

Subscribed and sworn to before me this 12th day of February, A. D. 1921.

[Seal]

J. D. BROWN,

Notary Public.

Notary Public in and for the City and County of San Francisco, State of California. [26]

I, W. M. Kearney, do hereby certify that I am solicitor for the defendant; that the foregoing is a true and correct copy of the answer to plaintiff's amended complaint in said action on file in the office of the Clerk of the above-entitled court and of the whole thereof.

W. M. KEARNEY,
Solicitor for Defendant.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Reply.

Comes now the plaintiff and replying to the defendant's answer to the amended complaint, admits, denies and alleges as follows:

I.

Replying to paragraph II, plaintiff denies that he was *the* the time mentioned, then and there walking upon and across said street in an unlawful, careless, negligent and indifferent manner.

II.

Replying to paragraph II, containing the new matter, constituting an alleged offense, to plaintiff's complaint, plaintiff is informed and believes, and upon such information and belief, alleges the fact to be that no oral lease or other lease existed at the times mentioned in plaintiff's complaint, between the defendant and Elizabeth A. Rogers, whereby said Elizabeth A. Rogers had the possession, control and operation of said ranches and automobile.

III.

Replying to paragraph III, plaintiff denies that said Fred Davis was driving said automobile in a

lawful, cautious and careful manner, and with the exercise of due and reasonable care, and denies [27] that the plaintiff did unlawfully, negligently, carelessly and recklessly and without due, or any care or caution, walk diagonally across said street in the middle of the block, and denies that he did unlawfully, negligently, carelessly or recklessly, and without due care or caution, walk and cross in front of said automobile in such manner that said Fred Davis could not, in the exercise of due and reasonable care and caution, prevent the said automobile from colliding with and striking plaintiff, and denies that plaintiff had the last clear chance, or any reasonable chance to escape said collision, and alleges the fact to be that plaintiff did use effort to avoid said collision and did then and there attempt to avoid said collision, and plaintiff further denies that he did not suffer serious pain and injury from said collision, and denies that he was not damaged as stated and alleged in his complaint, or to a greater amount than therein stated.

THEREFORE, Plaintiff prays that he be granted the relief demanded in his complaint.

ROBT. RICHARDS and
BOOTH B. GOODMAN,
Solicitors for Plaintiff.

State of Nevada,
County of Pershing,—ss.

J. B. Daniel, being first duly sworn, deposes and says: I am the plaintiff in the above-entitled action; I have read the foregoing reply and know the

contents thereof; that the same is true of my own knowledge, except as to matters therein stated as to information and belief, and as to such matters, I believe it to be true.

J. B. DANIEL.

Subscribed and sworn to before me this 19th day of February, 1921.

[Seal]

BOOTH B. GOODMAN,
Notary Public.

Certified a true and correct copy.

BOOTH B. GOODMAN. [28]

The case came on to be tried and was tried before a jury on the 1st day of June, 1921, and was concluded on the 4th day of June, 1921. The plaintiff appeared by his attorneys Booth B. Goodman and Robert Richards, and the defendant appeared by her attorneys William M. Kearney and Cantwell & Springmeyer. Hon. E. S. Farrington, District Judge in and for the above District presided and the following proceedings were had, to wit:

In the District Court of the United States, in and
for the District of Nevada.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

This case came on for trial in the above-entitled court on Wednesday, June 1st, 1921, at 10 o'clock A. M. of said day, before the Honorable E. S. Farrington, Judge of said Court, and a jury, a jury having been duly and regularly impaneled and sworn to try said case; Mr. Booth B. Goodman and Mr. Robert Richards appearing as attorneys for the Plaintiff, and Mr. William M. Kearney and Mr. George Springmeyer appearing as attorneys for the Defendant;

Whereupon the following proceedings were had and testimony introduced:

The pleadings were read by the respective counsel, and at 12 o'clock, the Court admonishes the jury, and a recess is taken until 1:30 o'clock P. M.

AFTER RECESS—1:30 P. M.

The clerk calls the roll of jurors. All present.

Upon request of counsel for the defendant, all witnesses in attendance for plaintiff and defendant, are marshaled, sworn, and placed under the rule.
[29]

Testimony of J. B. Daniel, in His Own Behalf.

Mr. J. B. DANIEL, the plaintiff, called as a witness in his own behalf, after being sworn, testified as follows:

Direct Examination by Mr. GOODMAN.

Q. Please state your full name?

A. Johnson Barton Daniel.

Q. You usually go by the initials merely J. B. Daniel, do you not? A. J. B. Daniel.

Q. Where do you reside, Mr. Daniel?

(Testimony of J. B. Daniel.)

A. At Lovelock.

Q. That is Lovelock, Nevada? A. Nevada.

Q. How long have you resided in Lovelock?

A. Since the summer of 1916.

Q. Are you engaged in business there, or have you been?

A. I am engaged in ranching at the present time.

Q. How long have you been engaged in ranching?

A. Since 1915.

Q. Have you any other profession or business?

A. Why, I am a professional mining engineer.

Q. Did you follow that occupation previous to the time you commenced ranching?

A. Well, since about 1880.

Q. And have you specialized in any particular branch of mining engineering?

A. The general subject of mining, examining mines and operating mines, and geology, assaying, chemistry; those things that pertain to the general line of mining.

Q. You are married? A. I am.

Q. And your wife resides with you at Lovelock, Nevada? A. Lovelock, Nevada.

Q. Are you acquainted with the defendant in this case, Millie L. Rodgers?

A. I know her, I am not personally acquainted with her.

Q. You have never met her?

A. I have never met her.

Q. Are you acquainted with Fred Davis?

A. I met him on one occasion.

(Testimony of J. B. Daniel.)

Q. When was that, Mr. Daniel?

A. When he ran over me with an automobile.

Q. Can you give the date?

A. The 28th of July, 1919. [30]

Q. And where did this occur, Mr. Daniel?

A. Lovelock, Nevada.

Q. Will you state fully to the Court and jury just what occurred at the time you were run over by an automobile?

A. I had gone to the office of the county commissioners to see about an appraisement of rates—

Mr. SPRINGMEYER.—Object on the ground it is not responsive to the question.

Mr. GOODMAN.—Merely preliminary.

The COURT.—If there is anything immaterial in the answer you can strike it out later. Go on.

WITNESS.—(Contg.) And coming from there I was going to the postoffice; getting to the pavement I looked up and down the street, as I always did, for automobiles; the street was very—was sparse of automobiles; there were two parked on the far end of the street on the south side, and one on the north side, down on the lower part of the street; nothing coming or going. I stepped into the street and looked again, and went on; and about halfway across the street I looked again, and an automobile was coming up; I simply paused to see on which side it was coming, either back of me or front of me, and the direction was back of me, and I proceeded; I hadn't gone but a few steps till I saw the automobile again coming directly for me, and I

(Testimony of J. B. Daniel.)

hastened my steps, and in three or four seconds—I did as well as I could—I jumped; I saw the automobile was coming to me right square, and I was struck by the center, and I threw myself over, and I was struck by the right mud-guard of the automobile, and I knew nothing more then until I found myself, my eyes open, I found myself under the automobile, and the rear wheel was coming toward me.

Mr. GOODMAN.—(Q.) Did you witness the rear wheel across your body?

A. Yes, I witnessed it; it crossed me right here (indicating).

Q. You stated that you were coming from a place that you went to consult with the commissioners; in what building was that?

A. That was in the Lovelock Mercantile Store Company Building.

Q. On what street is the postoffice in Lovelock, Nevada?

A. On what they call now Main Street, formerly Fourth Street. [31]

Mr. GOODMAN.—If the Court please, counsel has stipulated with me that this plat on the board, and I have stipulated with them that their plat, may be admitted and used without calling a witness to prove it.

The COURT.—Very well.

Mr. GOODMAN.—(Q.) Mr. Daniel, who prepared this plat? A. I prepared it.

Q. What does it represent?

(Testimony of J. B. Daniel.)

A. It represents the street on which I and the automobile were; it represents the buildings on each side of the street.

Q. Does it show the building you came from when you crossed to the postoffice? A. Yes.

Q. Will you please mark out or designate so the jury may see it, your course, just where you came from, and the course you took in crossing the street?

A. Here is the stairway that leads up to the second floor of the Mercantile Building (indicating on plat); coming down the stairway I took this course here; here is the pair of steps; here is an automobile supply station; I cut right across there, toward there, to go to the postoffice, coming down the stairway, this is the pavement; that is the course right straight over here, in a straight line (indicating).

Q. Now, Mr. Daniel, about where were you on the street when you first observed the automobile?

A. I was about in here, a little more than half-way across.

Q. And where were you approximately on the street, or as near as you can state, when the automobile first struck you?

A. About fourteen feet from the curb, about there (indicating on plat); it ran over me about eight feet from where it struck me.

Q. Please mark the place where it struck you as close as possible on the map. (Witness marks the point as requested on the plat.)

(Testimony of J. B. Daniel.)

A. And the place where it ran over me?

Q. Did you testify on that? Did the automobile when it struck you knock you down and run over you?

A. Knocked me down, I found myself on the ground. [32]

Q. You can't remember anything until—

A. (Intg.) Nothing until the rear wheel—I saw the rear wheel about that near me (showing) when I came to my senses, and run over my leg here, right across that way (indicating).

Q. Mr Daniel, on what spot, or approximately what spot were you after the automobile had passed over you?

A. About here (indicating on plat); about eight feet from—practically eight feet—from where it struck me.

Q. After the automobile had passed over you, you regained consciousness, and got up? A. Yes.

Q. Did you at that time observe where the automobile which had run over you, was standing?

A. It was standing over here (indicates on plat).

Q. Mark that point two, Mr. Daniel.

(The witness marks the point on the map as directed.)

Q. Have you ever on any occasion measured the distance to this spot which you have designated as being the spot where the automobile was standing, and the spot where you say you were struck?

A. Yes; eighty feet.

(Testimony of J. B. Daniel.)

Q. Eighty feet to the back of the car or front of the car?

A. Eighty feet to the front of the car.

Q. Mr. Daniel, have you had any experience in handling or driving automobiles?

A. Well, I have been driving an automobile for sixteen years.

Q. And during your experience in driving automobiles, have you from observation of speedometers, or otherwise, observed the rate at which automobiles travel? A. Yes.

Q. Did you form any opinion from your experience as to the speed at which the automobile was traveling at the time it struck you?

A. It was travelling all of twenty miles an hour.

Mr. KEARNEY.—I move the answer be stricken on the ground the plaintiff has not qualified as an expert on the rate of speed of cars; it is merely a conclusion without the proper foundation having been laid. The fact that a man has operated an automobile for sixteen years is no evidence that he is qualified as an expert to testify from observation, merely looking at a car, as to its speed. [33]

Mr. GOODMAN.—The rule is well known and generally accepted on matters of this kind, that opinion evidence is competent; and an automobile, as the Court takes judicial notice, has become so common most any person is competent to give opinion testimony as to the speed at which a car is going.

(Testimony of J. B. Daniel.)

By The COURT.—(Q.) Did you observe how fast that car was traveling, Mr. Daniel?

A. I should judge coming all of twenty miles an hour.

Q. I am not asking you how fast it was going, but I am asking you whether you noticed how fast it was going?

A. Well, it was coming—I don't understand exactly, your Honor. It was coming toward me.

Q. You gave your judgment as to how fast it was coming, how did you form such a conclusion as that?

A. Oh, from experience in observing automobiles travel.

Q. Well, you must have seen it and noticed its speed in order to give any judgment?

A. Exactly.

Q. Did you notice its speed at the time?

A. I noticed its speed, coming rapidly; I noticed its speed coming at least twenty miles an hour, as I say.

The COURT.—Well, I will let that stand for what it is worth.

Mr. GOODMAN.—(Q.) After you had this accident, Mr. Daniel, what did you do, did you go home?

A. I went into the postoffice; I was very much shaken up, partially dazed, but I walked into the postoffice, to the rear of the postoffice, and out again, I didn't get my mail, and on home; I am not living very far from the postoffice.

(Testimony of J. B. Daniel.)

Q. After arriving home, and after the experience you have testified to, did you observe or find any lacerations or injuries apparent from the skin and the outside of the body?

A. Well, after I got home, Mrs. Daniel got me to bed and sent for Dr. Smith; he came and made a superficial examination, and across my groin were the marks of the front wheel of the automobile, diamond shape marks.

Q. What color were the marks? [34]

A. They were black and blue, I don't know, darker all the time; he sent after some turpentine, and got some hot cloths, and treated me with turpentine.

Q. At the time that you were run over, and previous to that time, what was the general condition of your health, how were you feeling?

A. Oh, it has been poor.

Q. No, before that time?

A. Before that time I was hardy as a rock, had nothing to complain of at all.

Q. Did you ever have any other injuries of a similar character?

A. No; I had my right arm broken once at a mine.

Q. And in what manner did that accident occur; just the general manner, was it a cave?

A. No, a fall of rock from the roof.

Q. Was any other member of your body besides your arm injured in that particular accident?

A. No.

(Testimony of J. B. Daniel.)

Q. Did you ever have any other injuries?

A. No.

Q. After the experience you have testified to, Mr. Daniel, describe fully how you felt?

A. Well, it is a difficult thing to describe. The shock left me unnerved, and I had pain in my back, and especially in my right hip. Of course this injury here was painful, but I had, where the right wheel ran over my leg here, a lump began to grow there, and became almost as large as a hen's egg.

Q. Did that pain you?

A. And that was very painful, and it is still painful where that lump was formed.

Q. Proceed.

A. I was becoming stiff, and becoming sorer all the time.

Q. Did you say sorer?

A. Yes, becoming more sore constantly; as the effects of the shock left me the nerves began to act, you know, and the pain became more severe.

Q. That is, as the days went on you noticed the pain more?

A. Yes, the condition, that condition is growing.

Q. You speak of condition, you mean the pain is growing?

A. The pain is growing; the pain is more constant than it has been it seems to be developing. My old back for instance, at the present time, is sore, many places just as sore as a boil; and my

(Testimony of J. B. Daniel.)

thigh, the [35] hip is in constant pain, I can't lie on it scarcely.

Q. Have you noticed any pains in any other part of your body?

A. Well, occasionally. This pain runs down through here (indicating,) and settles in my knee, and it has on several occasions gone down to the ankle.

Q. Did you suffer from pains in the upper regions of your body?

A. My back and neck; my neck is very sore constantly; my neck now feels as though there was a heavy ring settled on here, and these pains run up on the side here, and over this way to the forehead; I have forehead pain almost constantly.

Q. You say almost constantly?

A. Almost constantly.

Q. How constant have the pains in your back been? A. How constant?

Q. Yes.

A. There is several places where it is almost constant. It is constant right in the lower part of the back, from this point here (indicating); my back feels as though I was holding a twenty-five pound weight there; sometimes it goes over, and sometimes it comes back; that is the impression I have.

Q. Did you observe any change in your legs or arms, or shoulders, after the accident?

A. Why, my right shoulder had pains in it, in the front here and in the back part.

(Testimony of J. B. Daniel.)

Q. How constant have those pains been?

A. Well, on the right shoulder they are not as constant as they are on the back, but they are constant enough, and give me annoyance almost all the time.

Q. State whether the physical condition of either shoulder has changed?

A. The shoulder is down about an inch from its natural position.

Q. What if any unusual sensation do you experience in the motion of your head?

A. Of my head?

Q. Yes.

A. Well, I can't move it very far, and when I do move it, it grinds.

Q. Where does it grind?

A. It grinds right back here in these muscles (showing).

Q. Move your head from right to left as far as you can.

(Witness does as directed.) [36]

Q. Since this occurrence, Mr. Daniel, have you noticed or observed any difficulty in walking?

A. Yes, I have trouble in walking.

Q. Describe the trouble.

A. Well, I can only describe it in this way, the brain sends a message—

Q. I don't want that kind of a scientific description.

A. My step is uncertain. For instance, I put my foot down to a certain point, a certain position,

(Testimony of J. B. Daniel.)

it sometimes goes to the right or left; now I get started, I can mechanically walk pretty straight, but occasionally even then one foot or the other gives out; it goes from the position I want to go, and I frequently fall, unless I catch myself by something.

Q. Have you experienced any different feeling in your feet since the accident, any different sensation or feeling in your feet when you walk?

A. Yes, my feet feel heavy, feel as though the soles of my shoes are lead.

Q. How constantly? A. That is constant.

Q. Before the accident, Mr. Daniel, how did you sleep? A. I slept fine.

Q. Was there any change after the accident?

A. Yes, I can get an average of five hours of sleep a night.

Q. What did you use to sleep?

A. Oh, I would sleep eight hours; I was always a good sleeper.

Q. What interrupts your rest? A. Pains.

Q. Mr. Daniel, have you the trousers which you wore at the time of the accident?

A. Yes, they are in that package.

Q. I will open this package, and exhibit to you this pair of tan trousers; examine them, Mr. Daniel, and state if those are the trousers which you had on? A. Those are the trousers.

Q. Can you testify whether or not the tear in them existed immediately before accident?

A. No.

(Testimony of J. B. Daniel.)

Q. Did the tear exist immediately after the accident? A. After the accident.

Mr. GOODMAN.—If the Court please, we offer these trousers in evidence. Any objection? [37]

Mr. KEARNEY.—No objection.

The COURT.—If there is no objection they will be admitted.

(The trousers are marked Plaintiff's Exhibit No. 1.)

Mr. G O O D M A N.—(Q.) Mr. Daniel, again directing your attention to this map, I will ask you if you will trace out on this map the course which the automobile took during the time that you observed it?

(Witness goes to the plat on the board, and traces the course.)

Q. Not only the general direction, but did it keep a general straight course? A. No.

Q. How, did it curve?

A. It started to come this way, when I was about there (indicates).

Mr. SPRINGMEYER.—Mark that point with an "A," where you were when you first saw it.

(Witness marks point "A" on the plat.)

WITNESS.—Coming this way, and going in that direction.

Mr. SPRINGMEYER.—Would you mark that with a "B" where the car first was when you first saw it.

(Witness marks point "B" on the plat.)

(Testimony of J. B. Daniel.)

WITNESS.—This is only 63 feet wide here, and it was about 135 feet when I saw it in this direction, about here; about here when I first saw it (indicates).

Mr. GOODMAN.—(Q.) And afterwards you say the automobile stood over here? A. Yes.

Q. Previous to the time you have testified about, that is, July, 1919, that year were you actively engaged in the business of ranching? A. No, sir.

Q. What duties did you perform?

A. I looked after the general ranching, planting and going over the ranch, and seeing that the work was done properly, indicating the work that was to be done, taking supplies from the city of Lovelock down to the ranch, usually twice a day, bringing men up, taking men down, sometimes three times a day.

Q. And you drove back and forth sometimes three times a day? A. Yes.

Q. How far is it from the city of Lovelock? [38]

A. The round trip is about twenty-five miles.

Q. After this injury, Mr. Daniel, did you continue to perform your duties? A. No.

Q. Have you tried to perform some of them?

A. Yes.

Q. With what result?

A. Well, I would make a trip down to the ranch and back, and I would have to lie up for practically the balance of the day, felt fatigued; I never knew what fatigue was until after I had this accident.

(Testimony of J. B. Daniel.)

Q. And you are easily fatigued after this accident? A. Easily fatigued.

Q. Do you experience any difference in your capacity for lifting?

A. Yes, I don't lift anything ever, I haven't lifted anything heavier than a scuttle of coal since I was injured.

Q. What business have you been following since this accident?

A. Nothing. This season I leased some of my land out; leased it out for others to farm; I could not do it, I could not look after it.

Q. So you have not followed the occupation of farming since the accident? A. No.

Q. Have you followed the occupation of mining engineer? A. No.

Q. Was there any reason why you should not follow that occupation?

A. I could not stand the work.

Q. You could not stand the work?

A. I could not stand the work; I could not do the walking necessary to inspect a mine, looking after properties, and so on.

Q. How much walking do you do?

A. Oh, I don't do over a half a mile a day, at an average.

Q. Does that walking have any effect upon your system? A. Yes.

Q. What effect?

A. It makes me fatigued and tired, tired in the legs especially.

(Testimony of J. B. Daniel.)

Q. Have you had any other illness since the accident, any ill feelings since the accident?

A. Well, I have a feeling of faintness sometimes, and those spells are becoming more frequent; it seems my legs won't hold me up, my knees give out, and I feel as though all of my vitality is giving out; I have never become senseless, but I am in such condition I can't do anything. [39]

Q. What do you have to do on those occasions?

A. Well, we found out when I feel them coming on if I lie down and take a drink of strong coffee, either hot or cold, it checks them.

Q. How frequently have you had those spells?

A. I have had them once a week latterly.

Q. That is, recently you have had them once a week? A. Yes.

Q. Did you ever have spells of that kind before this accident? A. Never.

Q. Did you ever have any serious illness during your life? A. Yes.

Q. What year?

A. In 1898 I had what the doctors thought was inflammation of the bowels.

Q. Were you operated on? A. I was not.

Q. Did you recover from that?

A. I recovered fully.

Q. That was in 1898? A. And about 1884—

Q. Well, since 1898, I will ask you have you had any illness?

A. Up to the time I was injured I have not been in bed for a day from illness.

(Testimony of J. B. Daniel.)

Q. From 1898. Mr. Daniel, after this accident did any other doctors besides Dr. Smith treat you?

A. Dr. Crawford, an osteopath down at Antioch, California, treated me for a month for this hip, and my neck.

Q. That is Dr. W. H. Crawford?

A. Dr. W. H. Crawford.

Q. Did any other doctor make any examination, or treat you?

A. Dr. Walker of Reno, M. D. Walker, I think are his initials; you know who I mean.

Q. And did you take any other medicines, or do anything else to aid your condition, any other kind of treatment besides medical treatment?

A. Only this osteopathic treatment. I had some ex-rays made by Dr. Walker.

Q. Did you find it necessary to go to any health resorts?

A. I went to Lake Tahoe; I could not sleep, I lost my appetite; I lost thirteen pounds in weight up till the 25th of August, and I was advised to go to Lake Tahoe, as it was quiet up there, the altitude was higher, and I might be able to get some rest; I went there, took [40] Mrs. Daniel and little niece, and the first afternoon I was there I slept all afternoon, and had dinner, and slept all that night very comfortably without waking up; we remained there four or five days, and I had very excellent results so far as sleeping was concerned.

Q. Have you kept any record of the amount of

(Testimony of J. B. Daniel.)

money you have spent for medical treatment?

A. Well, I have spent about \$450.

Q. Mr. Daniel, have you since the accident observed any change in your condition relative to ability to retain urine?

A. Yes; I have had a great deal of trouble, especially in the day time.

Q. And that is an inability to retain it?

A. Inability to retain it, not so badly at night because I am quiet at night, more or less.

Q. When you move around?

A. Oh, when I move around I urinate frequently.

Q. Did you have that trouble before the accident?

A. No, I didn't have it.

Q. Did you ever have any such trouble at any time during your life before? A. No, sir.

Q. Mr. Daniel, how long did you say you had lived in Lovelock?

A. Have I lived in Lovelock?

Q. Yes? A. Since 1916, the summer of 1916.

Q. Can you state how large a town Lovelock is, the population?

A. Oh, I should say about thirteen hundred people.

Q. Did you make any photographs, Mr. Daniel, of this portion of Fourth and Main Street?

A. I did.

Q. I show you two photographs, and ask you whether or not you can say those are the ones which you made? (Hands to witness.)

(Testimony of J. B. Daniel.)

A. Yes, I made those.

(The photographs are shown to counsel for defendant.)

Q. When did you take these photographs, Mr. Daniel?

A. Well, within ten days.

Q. Within the last ten days? A. Yes.

Q. Can you state whether or not the street itself, the sidewalks, the buildings and the structures are in the same condition now as they were in July, 1919? A. They are the same thing. [41]

Q. The steps represented upon this plat along the street on both sides? A. Yes.

Q. Can you state whether or not those steps are in the same condition they were?

A. Same condition exactly; they are made of concrete, and they have not been removed for some years.

Mr. GOODMAN.—I desire to offer in evidence the two photographs.

Mr. KEARNEY.—No objection.

The COURT.—They will be admitted.

(The photographs are marked Plaintiff's Exhibits No. 2 and No. 3.)

Mr. GOODMAN.—(Q.) Mr. Daniel, do you know whether or not the people in Lovelock make regular and common use of those steps in crossing?

A. They do, invariably.

Mr. GOODMAN.—I think that is all.

(Testimony of J. B. Daniel.)

Cross-examination.

Mr. KEARNEY.—(Q.) How old are you Mr. Daniel? A. How old?

Q. Yes.

A. I will be seventy-three next August.

Q. What is your birthday?

A. August 25th, 1848.

Q. Seventy-three, did I understand you to say?

A. Seventy-three next August, the 25th.

Q. How much do you weigh now?

A. One hundred and fifty-five pounds.

Q. How tall are you, Mr. Daniel?

A. About five feet, five, or five and a half, somewhere along there.

Q. Where did you get your education as a mining engineer? A. In the field.

Q. Whereabouts?

A. About Central America, in Mexico, California, Arizona.

Q. What part of Central America were you in?

A. Part of where?

Q. Central America.

A. In Honduras principally.

Q. Were you in the malaria country down there?

A. No, in the mountains; in fact, Honduras hasn't any malaria; you get malaria in Nicaragua.

Q. How many years were you down there?

A. I spent off and on about seven years. [42]

Q. Continuous?

A. About four years continuously, except trips to return to the States on business.

(Testimony of J. B. Daniel.)

Q. In what capacity were you employed down there in Honduras?

A. As part owner and mill constructor, opening up mines.

Q. Then all your mining experience has been just what you have picked up as a result of connection with mines?

A. No, I had mining education as a boy; I was brought up in a mining camp.

Q. You took no particular course in mining engineering, did you?

A. I took chemistry and assaying at school.

Q. Where? A. Pennsylvania.

Q. What school? A. Philadelphia.

Q. What is the name of the school?

A. I took a two-year course in chemistry at the Philadelphia College of Pharmacy.

Q. What year was that; what two years were they?

A. You mean the years?

Q. Yes. A. Seventy and seventy-one.

Q. Are you hard of hearing, Mr. Daniel?

A. Since I have had this accident, yes, I am hard of hearing; some times it is worse than others; sometimes my hearing is acute, other times it is dull.

Q. Just since the accident? A. Yes.

Q. How about your eyesight? A. My what?

Q. Eyesight. A. It is fine; my eyes are normal.

Q. Was your eyesight good at that time?

A. About the same as they are now.

(Testimony of J. B. Daniel.)

Q. Which ear did you say you don't hear so well in? A. I don't hear so well.

Q. Which ear? A. Both ears.

Q. Both ears? A. Yes.

Q. And you were never troubled with that prior to the time of the accident?

A. With the exception of the left one, but that is worse since I have had the accident. A man picked up a rifle one day ten or fifteen years ago, to shoot at a mark, and he had the muzzle of the [43] rifle near that ear, and I think that affected that ear; but the other ear, the right ear, was good right along.

Q. You said you never had had any sickness during your life?

A. No, I said I hadn't had any sickness for twenty years, since 1898.

Q. Did you have any difficulty or any trouble at all, constitutionally or otherwise?

A. No; I wasn't permitted to complete my sentence. About 1880 I had an attack of pneumonia.

Q. How long were you sick in 1898?

A. Oh, about ten days.

Q. And where was that sickness; where were you living during that sickness?

A. Webb City, Missouri.

Q. I understood that was some bowel trouble of some kind, inflammation of the bowels, I think you said? A. Why, they thought it was.

Q. That is what they call appendicitis now, isn't it?

(Testimony of J. B. Daniel.)

A. Well, it wasn't appendicitis; there was no operation; I don't know what it was; I know it was a bad pain for a while.

Q. Outside of that you have never had any treatment?

A. No. No, I have been a very healthy man all my life.

Q. Never been treated by a physician or anybody since that time? A. No.

Q. Did you know a man by the name of Dr. Crawford? A. Yes.

Q. What were you having him examine you for in 1915?

A. Well, I suppose it was a fad in the first place to have an osteopath treat you for general treatment, loosening up the bones and loosening up the muscles, and so on, without any regard as to any definite illness; and I have had, to tell the truth I have had an examination of my physical condition every year for a great number of years.

Q. Why didn't you say so then, that you had these doctors examine you from 1915 on, on the direct examination?

A. Because it wasn't for any disease; it wasn't for any illness.

Q. If you are a perfectly healthy man is it a usual thing to go to a doctor and have him go through you, and see if he can find something wrong with you? ?

A. I wanted to find out if I was normal, to keep in good shape, to [44] keep normal.

(Testimony of J. B. Daniel.)

Q. If you found you were in good shape what did you go back again for? A. In about a year.

Q. What did you go back the second time for?

A. To see that I was all right.

Q. You went back every year, didn't you?

A. Yes, I have been doing that for a number of years, have my heart tested, lungs tested, and urine tested.

Q. You went back in 1915, 1916, 1917 and 1918, didn't you? A. Yes.

Q. Then you were there in February, 1919, weren't you, six months before this accident was supposed to have occurred? A. Yes.

Q. How long was it after the accident occurred that you saw this man? A. How long after?

Q. Yes.

A. I think that Dr. Crawford examined me in January or February.

Q. What year?

A. 1919; that is my impression.

Q. And when did he next examine you?

A. He next examined me in the spring of 1920, I guess.

Q. Well, to be exact, it was on the 30th day of April, 1920, almost a year after this accident, was it not? A. Possibly.

Q. You didn't go to him between the 28th day of July and the 30th day of April, 1920, did you?

A. No; that examination was made for the purpose of diagnosing my troubles.

(Testimony of J. B. Daniel.)

Q. That was almost a year after this accident occurred? A. I suppose so.

Q. Now the day that this accident occurred, you got up yourself, and walked into the postoffice, did you not?

A. I did not—oh, after the accident, yes, I walked into the postoffice.

Q. And the boy, the young man who was driving the car, went in and put his hand on your shoulder, and talked to you, did he not?

A. He asked me if he should take me home.

Q. What did you say to him?

A. I said no. [45]

Q. Is that all you said?

A. I don't know what else I said; I know I objected to being taken home in the automobile, because Mrs. Daniel was very nervous, and I felt there might be trouble at home if I were taken home as an injured man.

Q. And the boy went in and asked if you were hurt, and asked if he could not take you home in his automobile, didn't he?

A. I don't know whether he asked if I was hurt; he asked if he should take me home in his automobile.

Q. And isn't it a fact you cussed at him and swore at him?

A. Oh, no, I never swore at him; I never swore at anybody, never have sworn.

Q. What did you say to him?

A. I told him no.

(Testimony of J. B. Daniel.)

Q. Did you pull away from him, tell him to get away from you?

A. I don't know anything about that; I could not pull away from him because he didn't have hold of me.

Q. Didn't he lay his hand on your shoulder?

A. He may have done that.

Q. And he courteously asked you if he could take you home?

A. He may have done that; he asked me if he could take me home, and I said no.

Q. Then you walked home yourself? A. Yes.

Q. How long was it after the accident before you walked home? A. It wasn't long.

Q. Well, how long did you remain in the post-office?

A. Oh, I remained in the postoffice probably five minutes.

Q. To whom did you talk while you were in the postoffice?

A. I didn't talk to anybody except the boy.

Q. What did you do in the postoffice?

A. I went back to the postoffice, I was dazed, went back to the postoffice to get my mail, but I didn't get it; I turned around and came back, and went home.

Q. How long were you home before you called in a physician, if you did call one?

A. Called one at once.

Q. Who did you call?

(Testimony of J. B. Daniel.)

A. Dr. Smith; Mrs Daniel phoned for him at once. [46]

Q. And he came up there, did he?

A. He came up.

Q. How long did he stay there?

A. Oh, he stayed probably fifteen or twenty minutes.

Q. And he examined you, didn't he?

A. He examined me; he examined to see where I was superficially injured.

Q. And what did he tell you then; isn't it a fact that he told you there was nothing seriously the matter with you?

A. No, he didn't tell me; he didn't say there wasn't anything serious the matter with me.

Q. He didn't go back again?

A. Yes, he came back the next day.

Q. What time the next day?

A. I can't tell you that.

Q. Was it in the forenoon or the afternoon that he went back?

A. It must have been in the forenoon.

Q. What did he tell you then; didn't he tell you there was nothing serious the matter with you?

A. No, he didn't tell me there was nothing serious the matter with me.

Q. He didn't come back the third time?

A. Yes, he did come back the third time, and put a plaster on me.

Q. When did he come back the third time?

(Testimony of J. B. Daniel.)

A. A few days after that.

Q. How many days? A. I could not tell you.

Q. Were you in bed when he came back the next time? A. No, I was not.

Q. Well, how many days after?

A. Probably a week; I won't say so, I won't say positively, because I don't know exactly what the time was, but he put a surgeon's plaster on me.

Q. Where did he put that plaster on you?

A. On my back, three thicknesses of surgeon's plaster, three inches wide.

Q. Tell me how long after the accident he did that?

A. I can't tell you; a week probably, a week or ten days, whatever it might be, probably.

Q. You were out the next afternoon, were you not?

A. The next afternoon I was out in the yard.

Q. You were out watering the yard the next afternoon?

A. No, I was not out watering the yard the next afternoon. [47]

Q. Where were you?

A. I was walking out in the yard, up and down the path.

Q. Dr. Smith didn't see you any more after that third time, did he? A. Yes.

Q. Tell me when?

A. He tried to take some X-rays for a long time, and his machine wasn't strong enough to be ef-

(Testimony of J. B. Daniel.)

fective; then he said, "I am going to Reno and I will see what I can find in Reno;" he came and told me that some drugstore in Reno would find out who had an X-ray machine, and if I came down I should go to him, and he would let me know; so I went down to Reno, and went to this drugstore, and they told me Dr. Walker had an X-ray machine.

Q. What date was that when you went to Reno to have this X-ray taken? A. That was October.

Q. That was from July to October before you went down there? A. Yes.

Q. October of what year? A. 1919.

Q. Now, in October, 1919, what time in October?

A. I don't know; probably the middle of October.

Q. About the 15th, is that as near as your recollection fixes it now?

A. I have a memorandum book; I can tell exactly when it was, if it is necessary.

Q. You had already been to Lake Tahoe, had you not, and drove your car up with your family, before you had these X-rays taken? A. Yes.

Q. When did you go to Lake Tahoe?

A. On the 25th of August.

Q. What year? A. 1919.

Q. Drove your own car, did you not? A. Yes.

Q. Where did you stop at the Lake?

A. I stopped at Glenwood.

Q. Glenwood or Glenbrook? A. Glenbrook.

Q. You drove your car clear to Glenbrook?

A. No, I took two days to it.

(Testimony of J. B. Daniel.)

Q. You drove the entire distance? A. Yes.

Q. Did you go to California at that time?

A. No.

Q. How long did you stay at Glenbrook?

A. Four or five days. [48]

Q. Where did you go then?

A. Came back to Reno.

Q. Did you stay in Reno.

A. Stayed in Reno about four days.

Q. You drove your own car back? A. Yes.

Q. Did you see any physician in Reno at that time?

A. I saw Dr. Gilsby about my neck; my neck was very sore.

Q. Did you see anybody else? A. No.

Q. You didn't see Dr. Walker that time?

A. No, didn't see him that time, didn't know him that time.

Q. Dr Smith was the only physician who examined you then in July or August? A. Yes.

Q. And during the first week that you were injured he saw you twice, once the first day and once two or three days after? A. Yes.

Q. And then a week or ten days after, after you had been out, he put a plaster on your back?

A. Yes.

The COURT.—(Q.) When did Dr. Smith see you the second time?

A. It was the next day after the injury.

Mr. KEARNEY.—(Q.) Now do you remember

(Testimony of J. B. Daniel.)

what day of the week the 28th of July was?

A. No, I do not.

Q. Do you remember where you went the following Sunday? A. I don't remember that.

Q. Did you ever go on a picnic with a crowd of children in your automobile?

A. No, I never took a crowd of children in my automobile to a picnic.

Q. Or anybody else's automobile; did you ever have a crowd of children with you going on a picnic?

A. No, I never had a crowd of children with me going on a picnic.

Q. Well, did you have one or more children with you going on a picnic on any Sunday three or four days after the accident was supposed to have occurred?

A. No, not three or four days after the accident.

Q. How long after, if at all, did you take such a trip?

A. I don't know; there was a picnic the 4th of July, but I don't know whether I attended that picnic or not.

Q. Will you say you didn't take some one to the picnic, or accompany them? Will you say you did not accompany any one to a picnic a few days after the accident? A. I don't remember it.
[49]

Q. Well, you were out driving your car a few days after the accident, were you not?

(Testimony of J. B. Daniel.)

A. Oh, no; I was not; it cannot be possible.

Q. Well, were you around town within a few days after the accident?

A. No, I was not out of town.

Q. Around the town, I say, around the town.

A. I might have been in town.

Q. You walked down town within two or three days? A. Yes, I went to the postoffice.

Q. Did you go to a moving-picture show three days after the accident? A. I can't tell you that.

Q. Wasn't it just a few days after the accident?

A. I can't tell you; I don't know.

Q. Were you at a moving-picture show at Lovelock within five days after the accident?

A. I can't tell you that.

Q. Well, will you say yes or no?

A. I can't tell you, I don't know; I cannot recall, that is pretty near two years ago, I cannot recall that.

Q. Do you recall having visited a moving-picture show in company with Mrs. Daniel and Mrs. Flick and Mrs. Beale?

A. No. I have heard of that story.

Q. Well, will you state you didn't accompany those people to a moving-picture show?

A. No, I didn't accompany those people to a moving-picture show.

Q. You didn't?

A. I and Mrs. Daniel may have gone to the moving-picture show, but we didn't accompany Mrs. Flick or Mrs. Beale.

(Testimony of J. B. Daniel.)

Q. Did you sit beside Mrs. Flick or Mrs. Beale when you went to the moving-picture show?

A. I don't know; I don't know Mrs. Beale; I never knew Mrs. Beale.

Q. Did you sit beside Mrs. Flick, another lady, at this time you went to a moving-picture show within five days after the accident?

A. I don't know, I don't think so.

Q. Did you ever meet Mrs. Beale?

A. I never met Mrs. Beale.

Q. Will you state you were never introduced to Mrs. Beale?

A. I will state I was never introduced to Mrs. Beale to my knowledge. [50]

Q. Were you ever introduced to Mrs. Flick at a moving-picture show?

A. I have known Mrs. Flick for a good many years, it was not necessary for an introduction.

Q. Will you state you were not introduced to Mrs. Beale at a moving-picture show within five days after the accident?

A. No; I never met Mrs. Beale; I know who Mrs. Beale is from Mrs. Daniel's and Mrs. Flick's conversation, but I never met her.

Q. Did you have any conversation at that time with Mrs. Flick? A. No.

Q. Did you say anything to her about your health at that time? A. No.

Mr. RICHARDS.—One moment! Well, it is answered.

(Testimony of J. B. Daniel.)

Mr. KEARNEY.—(Q) Were you discussing this accident in any way at that time?

Mr. RICHARDS.—May it please the Court, I desire to enter a formal objection to the evidence sought to be elicited by the question propounded, and similar questions, on the ground it is incompetent, irrelevant and immaterial, and is not proper cross-examination.

The COURT.—Well, I presume you contemplate laying a foundation to contradict the witness?

Mr. KEARNEY.—Yes, your Honor.

The COURT.—Will it not be necessary for you to refresh his memory by calling his attention to the people who were present and to the exact words that he used, as far as you can remember them?

Mr. KEARNEY.—I think that is correct. I want to lay the foundation as to the presence of the parties first.

Mr. RICHARDS.—If that is the purpose, we add to the objection the ground that the question is not sufficient in time, place, or circumstances to lay a foundation to impeach the witness.

Mr. KEARNEY.—(Q.) Do you remember the date that you went to Lake Tahoe, Mr. Daniel?

A. The 25th of August.

Q. August 25th, 1919? A. 1919.

Q. A few days, or a short time prior to August 25th, 1919, did Mrs. Flick introduce you to Mrs. Beale at a moving-picture show in Lovelock, and at that time did you state to Mrs. Flick and Mrs. Beale that [51] you were going to Lake Tahoe

(Testimony of J. B. Daniel.)

on an automobile trip in a short time, and that you were feeling all right?

Mr. RICHARDS.—We object to the question, and to the evidence sought to be elicited thereby, on the ground it is incompetent, irrelevant and immaterial; that it is not proper cross-examination, and that it does not tend to prove or disprove any issue in this case; and that it is remote from the injury alleged.

Mr. KEARNEY.—We desire to submit the matter on the ground it is competent for the purpose of impeaching the testimony of the witness. That is the purpose of the offer.

Mr. GOODMAN.—We add the objection that impeachment must be upon a material point; and regardless of how the witness might answer that, the point is not material enough to warrant the introduction of the evidence.

The COURT.—Well, would you regard testimony offered here now by the defendant to show that plaintiff was feeling first rate within a few days after this accident, as immaterial? I am inclined to think that would be material. He has testified as to his condition ever since the accident, and this is part of statements that were made by him as to his condition within four or five days after the accident. I think that is relevant. You may answer the question.

Mr. RICHARDS.—Plaintiff excepts to the ruling of the Court.

WITNESS.—Shall I answer the question?

(Testimony of J. B. Daniel.)

The COURT.—Yes.

WITNESS.—Will you put that question again, please?

(The reporter reads the question.)

A. I will say unequivocally no.

Mr. KEARNEY.—(Q.) What is your answer to the question as to whether or not Mrs. Flick introduced you to Mrs. Beale on that occasion?

A. No, I was never introduced to Mrs.—will you give me the first name of Mrs. Beale?

Q. I don't know it, I am sure. It is Mrs. R. H. Beale is all I know.

A. I was not introduced—Mrs. Chester Beale you have reference to?

Q. Mrs. R. H. Beale is all I have; she is a niece of Mrs. Flick. [52]

A. No, I was not introduced.

Q. During the period between July 28, 1919 and August 25, 1919, were you able to be out of the house and around town? A. Yes.

Q. Were you at moving-picture shows in the evening at any time during that period?

A. I presume so.

Q. Were you driving your automobile back and forth to your ranch? A. No.

Q. At any time? A. No.

Q. Prior to the time you went to Lake Tahoe?

A. No.

Q. When is the first time you drove your automobile after July 28th, 1919?

(Testimony of J. B. Daniel.)

A. I think it was when we prepared to go to Lake Tahoe.

Q. Were you out with any one else in an automobile between those dates?

A. I don't remember.

Q. You didn't see Dr. Walker until after you came back from Lake Tahoe, and had gone on to Lovelock?

A. No, I saw Dr. Walker, my impression now is, the 20th of October for the first time.

Q. The 20th of October. Did he take X-ray pictures of you? A. Yes.

Q. He made an examination of you did he not?

A. Yes.

Q. And he also made a report to you at that time, did he not, on your physical condition?

A. He made a report—

Q. (Intg.) Just answer yes or no.

A. He made a report on one—

The COURT.—Wait a minute.

Mr. KEARNEY.—Just answer that yes or no.

The COURT.—Read the question. I think you can answer it yes or no.

(The reporter reads the question.)

WITNESS.—You must qualify the report; he didn't make a report on the physical condition.

The COURT.—You can answer the question yes or no, and then you can explain later.

Mr. KEARNEY.—(Q.) He did not? A. No.

Q. Did he make any report to you at that time?

(Testimony of J. B. Daniel.)

A. He did; he made a statement with regard to one of the X-ray pictures that he made. [53]

Q. Just a moment now. Isn't it a fact that he reported after taking an X-ray picture of you that he could find nothing wrong with you? A. No.

Q. What was the report?

Mr. RICHARDS.—I object as not proper cross-examination; incompetent, irrelevant and immaterial. We offered nothing on this in chief.

Mr. SPRINGMEYER.—You said he was examined by Dr. Walker; we certainly have a right to find out what Dr. Walker said to him.

Mr. RICHARDS.—I didn't recollect that he said he was examined by Dr. Walker. I withdraw the objection.

Mr. KEARNEY.—I withdraw the question.

Q. It is a fact you didn't go back to Dr. Walker for any further treatment, isn't it?

A. Yes, I went back to him.

Q. When? A. The following March, I think.

Q. What time?

A. Well, I cannot give you the—May 5th and 6th probably.

Q. What year? A. 1920.

Q. Then from October, 1919, to May, 1920, you had no medical treatment? A. No.

Q. And you had an X-ray taken by Dr. Walker in October, 1919? A. Yes.

Q. On March 30th, 1920, you visited your old-time friend in Antioch, the osteopath, Dr. Crawford?

(Testimony of J. B. Daniel.)

A. No, I saw Dr. Walker about that time; I think it was in March, 1920, that I saw Dr. Walker and had additional pictures taken, and he gave me the following advice, if it is admissible.

Q. Well, that is hearsay. When did you see Dr. Walker then? A. Dr. Crawford?

Q. Yes. A. In May.

Q. Will you state that it was not in April, 1920?

A. No, I think about the first of May, I went down there.

Q. Well, the 30th of April, to be exact? Wasn't it the 30th of April?

A. No, I think we came home in June; I was down there a month. [54]

Q. Well, Dr. Walker didn't treat you for anything, did he?

A. No, he said it wasn't worth while; he could not do me any good, nor could any other physician do me any good.

Q. Both Dr. Walker and Dr. Smith are practicing physicians in the State of Nevada, are they not?

A. They are practicing physicians.

Q. They are physicians from the regular medical schools, are they not, practicing regular medicine?

A. I presume so.

Q. Dr. Crawford is an osteopath, and is not practicing now, is he? A. He is practicing.

Q. He was not practicing on April 30th, when you visited him in Antioch, was he?

A. No, he was living on his ranch. I don't know

(Testimony of J. B. Daniel.)

that was April, don't put that down as April; it was May some time.

Q. Dr. Crawford does not belong to one of the regular medical schools, does he; he practices in a different one than the regular physicians practice, doesn't he?

A. He is a graduate of the Kirksville Osteopathic College.

Q. He is not a graduate of any medical school that treats by the application of medicine?

A. I don't know; I never saw the diploma in either case.

Q. Now you said that you were crossing the street from the Mercantile Building to the postoffice on the day of the accident? A. Yes.

Q. What time of day was that?

A. Half past three in the afternoon.

Q. Were the Commissioners in session on that date?

A. The County Commissioners were in session that afternoon.

Q. In what building do the County Commissioners meet?

A. They met in Mr. Pitt's office in the Lovelock Mercantile Company's building.

Q. Upstairs? A. Upstairs.

Q. Now if I understood you correctly, you state that you left the sidewalk in front of the Mercantile Building to cross the street? A. Yes.

Q. Now did I understand you correctly, when you

(Testimony of J. B. Daniel.)

were about half [55] way across the street you saw the auto?

A. I said I saw two autos parked on the south side in the lower end of the block, and one auto parked on the north side of the street down near the end of the block, otherwise there wasn't an auto in sight.

Q. You said when you had proceeded to a point about half way across the street, you saw this auto coming? A. Yes.

Q. How far away was it when you first saw it coming?

A. From a hundred and twenty-five to a hundred and fifty feet.

Q. Was that the auto you saw parked on the south end of the street on the north side?

A. I don't know.

Q. Did that single auto parked on the north end of the street remain there when this other was coming down the street?

A. I don't know; I don't know where the auto came from; I thought it came from across the railroad.

Q. You say you thought it came from the railroad?

A. No, I didn't say I saw it come from across the railroad, but there wasn't any auto on the street moving, and in a couple of seconds this auto was coming up the street.

Q. Which way was it proceeding?

(Testimony of J. B. Daniel.)

A. Going toward the west, toward where I was walking.

Q. Where was this auto parked on the north side of the street, in front of what building?

A. I don't know; I cannot give you any idea; it was down the lower end of the street.

Q. What do you mean by down the lower end of the street?

A. Down toward Lovelock, down toward the railroad.

Q. Was it down toward the bank somewhere?

A. Well, down the lower part of the street; I can't tell you where it was parked, I just noticed down the lower end of the street.

Q. It was south of the point where you encountered the automobile finally? A. It was east.

Q. How does that Fourth Street run, east and west or north and south?

A. Well, practically east and west.

Q. Then the depot is east of the point where you were struck?

A. East of where the autos were parked. [56]

Q. Where were the other two autos parked?

A. They were on the south side of the street, down near the end of the street.

Q. Near what building, if you remember?

A. They must have been in front of the Big Meadow Hotel, because that takes up half the block.

Q. Can you describe that with more particularity, where that auto was on the other side of the street, the one that was parked?

(Testimony of J. B. Daniel.)

A. No, I can't. I simply saw it was idle down there, parked up against the curb.

Q. What kind of a car was it?

A. The one that struck me was a Ford.

Q. I mean the one that was parked.

A. Too far away for me to notice.

Q. You could not see that far away?

A. It wasn't too far away, but I didn't look for the design of the car, the style of the car.

(A short recess is taken at this time.)

Q. Did you see anything else on the streets of Lovelock that afternoon, besides the three automobiles?

A. I saw some people on the sidewalk.

Q. Well, were there any obstructions of any kind on the street? A. No obstruction whatever.

Q. The street was perfectly clear?

A. Perfectly clear east and west.

Q. You didn't see any lumber, or anything around the streets or sidewalks? A. No.

Q. You didn't see any sand or gravel anywhere?

A. No, no sand or gravel that I noticed.

Q. And you can't state how far from the south end of that block this car was parked on the north side of the street?

A. No, I don't know how far it was to the end of the block; I simply glanced at it and saw it standing there.

Q. Did you notice whether that car remained there as you proceeded out in the street?

A. Yes, it remained there, apparently it remained

(Testimony of J. B. Daniel.)

there; it was there when I stepped into the street, and started walking across the street. [57]

Q. Did that car move then? A. I don't know.

Q. You don't know whether the car moved from its position or not?

A. The car that struck me was moving all right.

Q. I am speaking now of the lone car that was parked on the north side of the street when you stepped off into the street?

A. I don't know.

Q. You didn't pay any attention to that car?

A. I saw it when I stepped into the street; it may be the car that struck me, I don't know.

Q. How many times did you look down that way after you stepped off the sidewalk?

A. I looked several times, or I would not have seen the car coming toward me.

Q. Now the car was a hundred and twenty-five feet away when you first saw it?

A. Approximately, when I first saw it.

Q. When you looked the second time how far was it? A. It was pretty close.

Q. How far?

A. If it was coming twenty miles an hour, it was coming at the rate of thirty feet a second, and it doesn't take long for two or three seconds to go by.

Mr. KEARNEY.—I move the answer be stricken as not responsive.

The COURT.—The answer was not responsive. It may go out.

(The reporter reads the question.)

(Testimony of J. B. Daniel.)

Mr. KEARNEY.—(Q.) How far away from you?

A. Why, I don't know, probably fifty feet.

Q. When you looked the third time how far away was it?

A. I kept my eye on it all the time from then, because it was coming so fast—trying to get out of the road of it.

Q. From the time it was fifty feet away you kept your eye on it constantly? A. Yes.

Q. What did you do when the car got up close to you, move or stand still?

A. Moved as fast as I could.

Q. In what direction did you move?

A. Toward the pavement, close to the pavement.

Q. How far from the pavement were you?

A. Oh, I don't know, probably eighteen feet, I can't tell exactly. [58]

Q. Did you run; did you quicken your steps?

A. Yes, I ran.

Q. When you saw this car fifty feet away from you, were you in a direct line with it then, in a direct line with its travel?

A. The car was coming right toward me, as though the driver had an object in striking me, as I was going across the street the car kept still coming toward me, and struck me when I was about fourteen feet from the curb.

Q. You say the car made a turn in toward the curb, did it?

A. Oh, yes, towards myself directly.

(Testimony of J. B. Daniel.)

Q. Did you attempt to stop then and let the car pass in front of you?

A. It was so close to me by that time that either going back or going front was the same thing; I could not have gone back.

Q. Which did you do, did you step back or forward? A. No, I stepped forward.

Q. Did you touch the car with your hands in any way?

A. No, I found that the car was going to strike me right in the center under the radiator, and I threw myself over that way.

Q. Which way?

A. Over towards the mud-guard.

Q. Which mud-guard?

A. The right-hand side, thought I would not fall directly under the car.

Q. Now you had the right hand fender, did you; you mean by the mud-guard the fender, I presume?

A. The fender—mud-guard.

Q. Did you take hold of the right-hand fender?

A. My arms threw out that way, that is all I know.

Q. Isn't it a fact that you grabbed hold of the right-hand fender after passing clear in front of the car?

A. No, I did not; no, I didn't pass clear in front of the car; the car was making a direct drive right for me, for the center of the car, and coming awful fast that last forty or fifty feet.

(Testimony of J. B. Daniel.)

Q. You had your hand on the right-hand fender of the car? A. I suppose so.

Q. And you also had your hand on the right-hand lamp of the car, did you not? A. How is that?

Q. Your other hand was on the right-hand lamp of the car, was it not? A. I don't know. [59]

Q. You don't know? A. No.

Q. Now that was on the side of the car closest to the postoffice? A. Yes.

Q. And you don't know whether you were eighteen feet or twenty feet from the curb at that time?

A. No, I was fourteen feet from the curb at that time, about.

Q. About fourteen feet from the curb. Now did you try to get out of the way of the car at all?

A. Sure I did.

Q. You saw it coming constantly, you had your eye on it from the time it was fifty feet away?

A. Approximately.

Q. Well, what did you do to try and get out of the way of the car during that time, when it was fifty feet from you; state what you did to try and get out of the way of that car? A. I ran.

Q. Oh, you did run? A. I ran, yes.

Q. Oh, I thought you said you didn't run.

A. I wasn't standing still, I was running.

Q. Which way did you run?

A. I ran toward the curb, because there was more space on the outside, on the south side, than there was on the north side for a man to pass.

(Testimony of J. B. Daniel.)

Q. Why did you say a moment ago you didn't run?

A. I didn't say I didn't run that I remember, if I did it was a mistake.

Q. Which is correct then; did you run or did you not run? A. I ran.

Q. Now about how far was the car away from you when you started to run?

A. It was pretty close.

Q. Well, about how many feet?

A. Probably ten feet.

Q. Now as I understand you, you were in a direct line with the car from the time you first saw it?

A. No, the car was in a direct line with me; the car was coming after me.

Q. You were in a direct line, that is, your eyesight was looking toward the front end of the car?

A. Yes.

Q. Now do I understand you to say that you can tell the speed of a car when it is coming in a direct line, that you can tell whether it [60] is going ten or twenty or thirty miles, when you are in a direct line?

A. You can, no question about that when a man is a judge of distances and speed.

Q. By looking at the car itself can you tell how fast it is going when it is in a direct line?

A. Coming in a direct line, a good judge of distances and speed can tell how fast that car is covering the ground.

(Testimony of J. B. Daniel.)

Q. At that time I suppose you stopped and figured the distance of 125 feet that the car was away from you, then made a quick mental calculation that car was coming twenty or thirty miles an hour?

A. No, I didn't; I didn't say so; I said by the time it got up speed, when it struck me it was running about twenty miles an hour.

Q. How did you make that calculation?

A. By the speed with which it came along.

Q. Did it increase its speed as it came along the street from the time you first saw it at 125 feet distance?

A. I didn't pay much attention to it after I saw it was going on back of me.

Q. You thought that car was going on back of you?

A. Precisely; when I saw that the car turned out, turned out to the left or back of me, coming in that direction, that it was perfectly safe to cross; when I looked at it again, quite a few feet from that position, the car turned around and was coming directly as fast as I could go across the street, it was coming toward me; it just looked to me as though the driver was trying,—was going to try to create a sensation by knocking somebody over.

Q. You thought this young man driving this car was one of those fellows who wanted to commit a murder?

A. No, I didn't say that; I didn't say that.

Q. Now, Mr. Daniel, tell me how you determine

(Testimony of J. B. Daniel.)

the speed of this car when it was in a direct line with your eyesight, and tell me when you made that calculation?

A. Well, the brain acts very rapidly in a crisis, and the speed at which that car was coming, I could see it coming, I was getting out of the road as fast as I could. [61]

Q. Now you have not answered my question.

A. What?

Q. Just tell me when you made this calculation that this car was coming at the rate of twenty miles an hour?

Mr. GOODMAN.—I think the answer is responsive. He also asked how he made the calculation, and the witness is explaining how he made the calculation.

The COURT.—Is that the same question as before? I understood the first question was how he made the calculation, and now you have changed it to when he made the calculation.

Mr. KEARNEY.—I will ask the first question.

Q. How did you make that calculation to figure the speed of the car?

A. Well, it is one of those things by which judgment acts very quickly; you make a judgment from the conditions that you see; you don't have very much time to calculate nor to figure, but the judgment,—the mind acts quickly as to the judgment of the party as to speed and distance, and that was so in my case.

(Testimony of J. B. Daniel.)

Q. That thought came to you right there, that he was going twenty miles an hour? A. Yes.

Q. Did you make that calculation before the car struck you, or after?

A. No, I made it after; the thing was so impressed on my mind, the speed and the getting over the ground was so impressed on my mind.

Mr. RICHARDS.—I didn't get the answer.

WITNESS.—It was so impressed on my mind that thinking of it afterwards, that car was going not less than twenty miles an hour.

Mr. KEARNEY.—(Q.) Was the car going twenty miles an hour when you first saw it?

A. No, I don't think it was; it was gathering speed very rapidly.

Q. When did it attain the speed of twenty miles an hour?

A. Oh, I can't tell you that.

Q. Then you can't tell how fast it was going when you first saw it?

A. No; it wasn't going so rapidly, I know that, but it was getting up speed very rapidly.

Q. You said the front wheel of the auto ran across your leg? A. Pardon me? [62]

Q. You said the front wheel of the auto ran across your leg?

A. No, I said it ran across my abdomen, the lower part of my abdomen, the front wheel.

Q. Which leg did it run across?

A. The left one, right here (showing); the front

(Testimony of J. B. Daniel.)

wheel hit that thigh bone, came right across this way.

Q. Were you lying on your face or your back?

A. No, I was lying on my back, at right angles to the car.

Q. How much did you weigh when you lost that twenty-five pounds you spoke about?

A. When I what?

Q. When you lost that twenty-five pounds weight.

A. I lost between the 28th of July and the 25th of August, thirteen pounds in weight.

Q. Oh, thirteen pounds in weight; what was your weight at that time?

A. One hundred and fifty pounds.

Q. You weighed one hundred and fifty in August? Now you gained weight since then, did you? A. I have gained since then.

Q. You look very healthy now.

A. Yes, I haven't very much to do, and Mrs. Daniel feeds me pretty well.

Q. Did I understand your eyesight wasn't very good? A. How is that?

Q. Did I understand your eyesight wasn't very good? A. No, my eyesight is fine.

Q. Can you read the clock there?

A. Oh, yes, readily.

Q. Your head didn't bother you then when you turned it a little, did it?

A. No, my eyesight is all right.

Q. There wasn't very much ranching going on last year in Lovelock Valley, was there?

(Testimony of J. B. Daniel.)

Mr. RICHARDS.—Object to the question as not proper cross-examination, incompetent, irrelevant and immaterial.

Mr. KEARNEY.—If the Court please, he stated that he didn't take care of his ranch last year in Lovelock Valley, and I think it is very pertinent to show there was no ranching going on; we expect to show the reason *why was*, there wasn't any occasion for any ranching.

The COURT.—I will allow the question if that is the purpose of it. [63]

Mr. KEARNEY.—That is the only purpose of it.

Q. You stated you didn't do any ranching last year in Lovelock Valley? A. Not in 1920.

Q. There wasn't any water?

A. There wasn't any water.

Q. In 1919 the ranching season was over?

A. Yes.

Q. You went to Lake Tahoe on a vacation during the latter part of the season, after the ranching was over? A. Yes.

Q. Last year there wasn't any occasion to plant any grain or anything, the river was absolutely dry, there was no water? A. Yes.

Q. Is not that the reason you didn't engage in ranching last year?

A. Didn't engage in ranching?

Q. Yes. A. Certainly.

Q. You state that you spent \$450 for medical attention? A. Approximately.

(Testimony of J. B. Daniel.)

Q. Detail those amounts and to whom paid; give me the amounts you paid out, and to whom?

A. (Examining book.) 1919, from August 25th, well, Lake Tahoe trip, was \$99.70.

Q. That is for yourself and all the family?

A. How?

Q. That is for yourself and family?

A. That is for myself and wife, yes. October 21st and 22d, to see Dr. Walker, was \$36.25. March 5th and 6th, Reno, to see Dr. Walker, about \$42, in round figures.

Q. Does that include your railroad fare, etc., hotel bills? A. Exactly.

Q. And everything? A. Sure.

Q. Did you drive in your car that time?

A. No, I did not.

Q. How much of that was given to Dr. Walker for taking X-rays? A. Well, I paid him \$20.

Q. I mean on those two dates there, out of that \$42? A. And I paid him \$15.

Q. Is that all?

A. That is all I paid him for his services.

Q. One was in October and the other was in March? A. March 5th and 6th. [64]

Q. That October, \$36.25, the difference represented some expense?

A. Well, when you go to see a doctor you have to pay railroad fare, when he is out of town.

Q. I am speaking now of the amount you actually gave the doctor on those two trips.

(Testimony of J. B. Daniel.)

A. That would be \$35, outside railroad fare and hotels.

Q. What else is there?

A. Dr. Chestnut, eight dollars.

Q. Doctor who is that? A. Chestnut.

Q. Who is he and where does he live?

A. He lived at Lovelock.

Q. What treatment did he give you?

A. Chiropractic, working on my neck.

Q. When was that?

A. That was April, 1920. Dr. Crawford, April 30th, \$10; and trip to Antioch for treatment by Dr. Crawford, \$233.62, including railroad fare and hotel.

Q. Was that all your own personal expense?

A. Sure it was my personal expense.

Q. Who was with you? A. Mrs. Daniel.

Q. Didn't that include her expense?

A. She was nurse.

Q. How long did you stay?

A. I had to take some one with me.

Q. How long did you stay away on that trip?

A. A month.

Q. Where did you stay?

A. Antioch, California.

Q. All of the time? A. Yes.

Q. And you paid the doctor ten dollars?

A. No, I didn't pay him—that was another time I paid him the ten dollars.

Q. How much did you pay him that trip?

A. I don't know; I don't remember what I paid

(Testimony of J. B. Daniel.)

him on that trip; I have this all bunched in one lot, May 20th to June 20th.

Q. What year?

A. Antioch trip and expenses to Dr. Crawford, \$233.62.

Q. Can you tell me how much you gave Dr. Crawford?

A. I don't know; I suppose his charges were \$50.

Q. Don't you know?

A. Not without looking it up in my check-book.

Q. In making this memorandum didn't you take that from actual figures you put down at the time?

A. There is the entry (showing) May 20th to June 20th, Antioch trip [65] expenses and Dr. Crawford, \$233.62.

Q. Didn't you itemize that?

A. It is not itemized.

Q. At the time? A. It is not itemized.

Q. Where did you live while you were down there? A. Where did *he* live?

Q. Where did you live? A. Lived at the hotel.

Q. All the time?

A. All the time, the Bradshaw Hotel.

Q. Mrs. Daniel lived there with you all the time?

A. Yes.

Mr. KEARNEY.—I think that is all.

Redirect Examination.

Mr. GOODMAN.—(Q.) Mr. Daniel, you stated on cross-examination that you didn't ranch last year because there wasn't any water in the Hum-

(Testimony of J. B. Daniel.)

Humboldt River; was there any additional reason; could you have ranched had there been water?

A. I could have ranched; I would have leased the ranch out if there had been water.

Q. Well, could you have managed the ranch as you had in former years?

A. No, I could not have looked after it myself.

Q. And is there plenty of water in the Humboldt River this year? A. Yes, ample.

Q. How much of the land is leased?

A. There is in the neighborhood of five hundred acres.

Q. How much is idle? A. Twelve hundred.

Q. Did you testify as to what kind of a car struck you, what kind of a model?

A. It was a Ford.

Q. What model, a touring car?

A. A touring car.

Q. The ordinary five-passenger touring car?

A. Yes, a touring car.

Q. How far do you live from the postoffice in Lovelock, Mr. Daniel?

A. About three hundred feet.

Q. The distance would be about a hundred yards?

A. A hundred yards, yes.

Q. And that is the distance you had to walk home from the postoffice? A. Yes.

Q. You said that you walked out in the yard, up and down the pathway in the back yard a few days after the accident; did you have any [66] difficulty in executing that exercise?

(Testimony of J. B. Daniel.)

A. Yes, I had difficulty.

Q. Did you have any reason then for doing it?

A. How?

Q. Why did you do it then?

A. I wanted some out-door air; I am so accustomed to out-door air, and my muscles were sore and stiff, and I just felt this way, if I remain here any longer I will go under, I have got to get out and get some exercise, and get these muscles limbered up.

Q. And it pained you to do the exercise?

A. The pains were due to the condition of the nerves and muscles, the injuries.

Q. Did you testify as to who was driving the car that run over you, the name?

A. A young fellow by the name of—what was his name, I have forgotten?

Q. Well, state whether or not it was Fred Davis, if that was the name?

A. Fred Davis, that was the name, that was the boy.

Q. In driving your car to Lake Tahoe, as you have testified you did, did you take that trip merely for a summer vacation, merely because the ranching season was over?

A. No, I took it on the advice of some persons who said I might get rest if I would go to a higher altitude, and where it was quiet.

Q. How long did it take you to make the trip in the car?

(Testimony of J. B. Daniel.)

A. It took me about twelve hours from Lovelock to Carson City, we remained there over night.

Q. Previous to your accident have you driven that same distance with the roads in approximately the same condition?

A. Oh, drive it in five hours.

Q. Did you suffer any ill effects at that time?

A. Well, we stopped frequently on the road; stopped particularly at Wadsworth for a long time, and at Reno.

Q. Have you driven your car lately, Mr. Daniel?

A. Have I driven the car lately?

Q. Yes. A. Yes.

Q. Do you have any trouble in driving any distance?

A. Driving the car is done, of course, with the arms; my wrists [67] and arms are in pretty good shape, but I get very much fatigued in riding.

Q. You testified something, and were asked some questions concerning interviews with Dr. Walker; how many times did you see Dr. Walker?

A. I saw him twice.

Q. And you said something concerning his giving you a report?

A. The second time he made three X-ray pictures, he gave me a thorough examination, and a diagnosis, and when he got through he said—

Mr. KEARNEY.—Just a moment! Was that report in writing? A. No, it wasn't in writing.

Mr. KEARNEY.—Then we object to it upon the ground it is hearsay.

(Testimony of J. B. Daniel.)

Mr. GOODMAN.—If the Court please, this is a proper question for the reason that on the cross-examination counsel went into the question of this report in such a manner that makes it proper for the witness to explain himself on redirect examination as to what the report was.

Mr. KEARNEY.—The question was withdrawn.

Mr. SPRINGMEYER.—He can't state what anybody else told him.

The COURT.—I don't see any ground where it is admissable on the score of cross-examination.

Mr. GOODMAN.—I mean redirect examination of the cross-examination.

The COURT.—Well, on redirect either.

Mr. GOODMAN.—(Q.) Have you seen or tried to see Dr. Walker recently? A. Yes.

Q. When? A. Monday.

Q. Did you see him Monday?

A. I could not; in the first place I wired to Dr. Walker last week.

Mr. SPRINGMEYER.—We object on the ground it is not responsive. We don't care about this.

Mr. GOODMAN.—We do.

WITNESS.—I tried to see him, and he was out of town.

The COURT.—Just answer no, then; you didn't see him. [68]

Mr. GOODMAN.—(Q.) Mr. Daniel, you testified before that—I will ask permission of the Court to ask this question; probably I asked it in my first examination, as to why he made the statement that

(Testimony of J. B. Daniel.)

he was struck here, and when he got up he was a distance from where he was struck.

Q. You testified, Mr. Daniel, that the car struck you in one spot, and when you recovered yourself on the ground, after the car passed over you, you were some little distance away; how did you know that?

A. My hat was about eight feet back of where I found myself on the ground.

Q. Did you have any other reason for knowing it?

A. Not particularly; there was no wind to blow it back there.

Q. Did you remember anything between the time of the impact of the car with your body and the time when you say you opened your eyes and saw the hind wheels going over you?

The COURT.—Read that question.

(The reporter reads the question.)

Mr. KEARNEY.—That is objected to as based upon something not in evidence; it is not proper redirect examination.

The COURT.—It seems to me that you went into that once before. Didn't he state when he was struck he didn't remember anything until he found himself in front of the wheel, the rear wheel, and that was about to go over him, that he saw it go over him?

Mr. GOODMAN.—I think the testimony was substantially that, your Honor, but I didn't know whether it was made in such a connected manner that the Court or anybody else would understand it.

(Testimony of J. B. Daniel.)

The COURT.—I will allow you to ask the question if you want to find out his mental condition, or whether he knew what was going on at that time.

(The reporter reads the question.)

WITNESS.—Answer that?

The COURT.—You may answer the question, yes.

A. I did not.

Mr. GOODMAN.—(Q.) You said you came from a commissioners' meeting when you crossed the street; were the commissioners in a [69] regular ordinary session that day? A. They were.

Q. For what purpose?

A. For the purpose of adjudicating—

Mr. SPRINGMEYER.—That is immaterial, and objected to on that ground.

The COURT.—I don't see the purpose of it.

Mr. GOODMAN.—The purpose is that the meeting day of the County Commissioners is fixed by law, and this happening on the 28th, it really might be explained that there was a special meeting, that is the only purpose.

Mr. SPRINGMEYER.—We submit, may it please the Court, it is immaterial.

The COURT.—Well, if the objection is made, later it will properly come in as rebuttal.

Mr. GOODMAN.—That is all.

Recross-examination.

Mr. KEARNEY.—(Q.) Do you know how far it is from Lovelock to Reno, Mr. Daniel?

A. Oh, I don't know; in round figures about a hundred miles.

(Testimony of J. B. Daniel.)

Q. Do you know how far it is from Reno to Carson? A. Thirty-one.

Q. And do I understand you to say that you usually drive that in five hours?

A. I never drove at all—

Q. Why did you say that the usual time it takes you to drive that is five hours?

A. I said a man with a good car could drive it in about five hours; that is where I got my impression.

Q. You have never driven it yourself in five hours?

A. No; they say they have driven from Lovelock to Reno in four hours; if they could do that, they could drive up from Reno to Carson in an hour.

Mr. KEARNEY.—That is all.

Mr. GOODMAN.—That is all, Mr. Daniel.

Mr. RICHARDS.—If the Court please, we desire to offer in evidence City Emergency Ordinance number 5, of the City of Lovelock, certified to under the seal of the clerk of the city. [70]

The COURT.—Is there any objection?

Mr. KEARNEY.—We object to the offer, if the Court please, first upon the ground it is not within the issues of the complaint; there is no allegation in the complaint sufficient to support the offer, and it is therefore incompetent, irrelevant and immaterial. There is no issue in the complaint showing that such an ordinance was in force and effect at the date alleged in the complaint, and it therefore becomes incompetent, irrelevant and immaterial. In

(Testimony of J. B. Daniel.)

support of that I desire to read the allegation in the Amended Complaint, which is as follows:

“That at the time stated the said servant was driving said automobile at an unreasonable, dangerous and excessive rate of speed, and in a negligent, careless and dangerous manner, and that plaintiff was at all times exercising due care and caution on his part. That such rate of speed at which the said servant was driving the said automobile, at the time he drove the same upon and over plaintiff, was in excess of twelve miles per hour and in violation of Ordinance No. 5 of the City of Lovelock prohibiting the driving of motor vehicles upon streets within the city limits and particularly the street mentioned at a rate of speed greater than twelve miles per hour.”

Now the complaint is absolutely devoid of any allegation which will entitle them to offer this proof, that the said ordinance was in force and effect at the time of the said accident is alleged to have occurred, and without an allegation of that sort, there was no issue raised in the complaint, and we cannot see that there is any materiality in the offer of the ordinance at this time. Under a proper allegation it perhaps might be admitted, but under the present state of the pleadings there is no foundation for it whatsoever.

(Argument.)

(The ruling is withheld until to-morrow morning to give counsel an opportunity to produce authorities.) [71]

Testimony of Mrs. Cora F. Darrah, for Plaintiff.

Mrs. CORA F. DARRAH, called as a witness by plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. GOODMAN.

Q. Please state your full name?

A. Cora F. Darrah.

Q. Was your name formerly Davis?

A. It was, yes.

Q. Do you know Fred Davis? A. I do.

Q. Is he related to you? A. Yes, he is my son.

Q. When was he born?

A. On the 16th day of May in 1905.

Mr. GOODMAN.—That is all.

Mr. KEARNEY.—That is all.

Testimony of James A. Meffley for Plaintiff.

Mr. JAMES A. MEFFLEY, called as a witness by plaintiff, testified on direct examination as follows:

“My name is James Albert Meffley. I have lived in Lovelock three years, during which time there has been no change in the condition of the streets. Last Sunday I performed some experiments with a Ford touring car at the request of Mr. Goodman.”
Thursday, June 2d, 1921.

10:00 o'clock A. M.

Court convened.

(It is stipulated that the jury is present.)

Mr. GOODMAN.—We are to take up the question of the introduction of the ordinance this morning.

(Testimony of James A. Meffley.)

Mr. SPRINGMEYER.—The objection made, may it please the Court, was that the ordinance was inadmissible for the reason that it is not pleaded in the complaint that the ordinance was in existence at the time when this accident occurred. We now offer an additional objection, that the ordinance is not pleaded in *totidem verbis*, as required in the pleading of ordinances before evidence as to the existence of such ordinance may be admitted.

(Argument.)

The COURT.—I shall overrule the objection, and admit the ordinance.

Mr. SPRINGMEYER.—We take an exception on the grounds stated in [72] the objection. We will stipulate that you may state what the substance of the ordinance is at the present time, without reading the whole of the ordinance.

(The ordinance is marked Plaintiff's Exhibit No. 4.)

Mr. GOODMAN.—I would like to read section 4. (Reads:)

“Sec. 4. It shall be unlawful for any person to drive, run, propel, operate or cause to be driven, run, propelled or operated, any vehicle on turning corners within the limits of the City of Lovelock, at a speed greater than eight miles per hour, or in the business and school district of said City at a speed greater than ten miles per hour and in all other portions of the city at a speed greater than fifteen miles per hour. The business and school district shall include all of those streets and por-

(Testimony of James A. Meffley.)

tions of streets in the City of Lovelock, described as follows: * * * Provided that this section shall not apply in the case of the police or fire departments of the City of Lovelock nor to any hospital ambulance or physician in answering professional calls.”

The COURT.—What is the date of that ordinance?

Mr. GOODMAN.—Proposed October 16, 1917; passed and adopted October 18, 1917; approved by the mayor on the 18th day of October, 1917.

The COURT.—What is the penalty for violating the speed ordinance?

Mr. GOODMAN.—Section 13 reads: “Any person, firm, association or corporation who shall be found guilty of a violation of any of the provisions of this ordinance shall be punished by a fine of not exceeding \$150 or by imprisonment in the city jail for a period not exceeding thirty days or by both such fine and imprisonment.” And section 14 is a general repealing clause of all ordinances in conflict with it.

If the Court please, we have set forth in our complaint a statute of the State of Nevada regulating motor vehicles, and while that statute has been pleaded, as provided, by title and reference, and it is the rule in Federal Courts that judicial notice is taken of all State statutes, I would ask permission to read section 9 of “An Act to amend sections 2, 9, 11, 24, 25 and 27 of an Act entitled [73] ‘An Act regulating automobiles or motor ve-

(Testimony of James A. Meffley.)

hicles on public roads, highways, parks or parkways, streets, and avenues, within the State of Nevada; providing a license for the operation thereof, and prescribing penalties for its violation; designating the manner of handling the receipts therefrom, and the purpose for which it may be expended, and in what manner, and repealing an act of the same title, approved March 24, 1913,' approved March 24, 1915."

Section 9 of that Act reads: "No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person or the safety of any property. Nor shall any person incompetent to properly handle a motor vehicle nor an intoxicated person be permitted to drive the same. No person under sixteen years of age shall be permitted to drive or operate any motor vehicle in any incorporated or unincorporated city or town in this state. For a violation of this section any peace officer may arrest the driver of such motor vehicle and remove from the same the license number plate thereof, and such number plate shall not be restored to the owner thereof except upon payment of \$10 in addition to the fine provided by this act."

The Court taking judicial knowledge of the act, I will not ask to read the other parts of it. I

(Testimony of W. R. McCullough.)
presume the Court accepts that rule as to taking
judicial notice.

The COURT.—No objection to that, is there?

Mr. SPRINGMEYER.—None, your Honor.

Testimony of W. R. McCullough, for Plaintiff.

Mr. W. R. McCULLOUGH, called as a witness by
plaintiff, having been sworn, testified as follows:

Direct Examination by Mr. GOODMAN.

Q. Your name is W. R. McCullough?

A. Yes, sir.

Q. Where do you reside?

A. Lovelock, Nevada.

Q. How long have you resided there?

A. Four years.

Q. Were you there on the 28th day of July, 1919?

A. Yes, sir. [74]

Q. Do you know Fred Davis? A. Yes, sir.

Q. What position did you occupy with reference
to the Rodgers or Reservation ranch on that day?

A. I was employed as superintendent.

Q. Was Fred Davis working on the ranch?

A. Yes, sir.

Q. Do you remember of his having an accident
with an automobile on that day? A. Yes, sir.

Q. Do you know for what purpose he went down
with it from the ranch?

Mr. SPRINGMEYER.—Objected to on the
ground that it is immaterial.

Mr. GOODMAN.—I intend to connect it up, to

(Testimony of W. R. McCullough.)

show it was in the performance of his official duties.

Mr. SPRINGMEYER.—Well, ask him if he was on business of the ranches.

Mr. GOODMAN.—(Q.) Was he on business of the ranches in taking that trip down that day?

A. Yes, sir.

The COURT.—Well, I think it is material to show that he was engaged in the defendant's business, and in the defendant's employ.

Mr. GOODMAN.—(Q.) You employed him, did you not? A. I did.

Q. It was part of his duty to drive automobiles?

A. Yes, sir.

Mr. GOODMAN.—That is all.

Cross-examination.

Mr. SPRINGMEYER.—(Q.) Mr. McCullough, you said you were employed in July, 1919, as superintendent of the Rodgers or Reservation ranches?

A. I was.

Q. For whom were you then employed?

A. I was employed by Mrs. Rodgers.

Q. Is that Mrs. Elizabeth A. Rodgers?

A. It is.

Q. Who paid your salary, Mr. McCullough?

A. I signed the checks myself; Mrs. Rodgers deposited the money in the bank to pay them.

Q. To whom did you account?

A. Mrs. Rodgers.

Q. Who paid the supplies of those ranches?

Mr. GOODMAN.—I object as improper cross-

(Testimony of W. R. McCullough.)

examination. Counsel can make him his own witness, if he desires.

Mr. SPRINGMEYER.—May it please the Court, he said on direct [75] examination that he was employed as superintendent on the Rodgers or Reservation ranches; now I certainly have the right to know whether he was or not; I have a right to find out on cross-examination who his employer was, I submit.

The COURT.—Do you object to that?

Mr. GOODMAN.—Yes, your Honor.

The COURT.—Why?

Mr. GOODMAN.—Upon the ground that it is not proper cross-examination. He said he was employed as superintendent of the ranches; I didn't ask him by whom he was employed.

The COURT.—I guess that is true. He said he was employed, he didn't say by whom. I think that is part of your defense. I will sustain the objection, as that is a part of your defense.

Mr. SPRINGMEYER.—Exception on the ground it is proper cross-examination.

Mr. GOODMAN.—I ask that the evidence relative to by whom he was employed, be stricken.

The COURT.—That may go out as not being cross-examination. It is relevant, but it is not cross-examination.

Mr. SPRINGMEYER.—We take an exception on the ground it is too late; counsel should have objected at the time the questions were asked; and on the further ground it is proper cross-examination.

(Testimony of W. R. McCullough.)

Q. You say you employed Fred Davis?

A. Yes, sir.

Q. Was he working for you, do you mean by that; or was he working for someone else?

A. I mean by that he was working for the Rodgers Ranch, under my supervision.

Q. Well more directly then, for whom was he working, if you know?

Mr. GOODMAN.—I object to that on the same ground; that it is part of the defense in this action; it is attempting to elicit testimony by cross-examination beyond the reasonable limits of the rule.

Mr. SPRINGMEYER.—He said he employed Fred Davis; I am finding out whether he employed him or not.

(By direction the reporter reads the question.)

The COURT.—I don't think that is cross-examination; I think that is part of your defense. [76]

Mr. SPRINGMEYER.—We take an exception to the Court's ruling on the ground that it is proper cross-examination.

Q. In whose employ, if you know, was Fred Davis on the date this accident occurred?

A. He was employed by Mrs. Elizabeth Rodgers.

Mr. GOODMAN.—Object to that as not cross-examination, and as a conclusion of the witness. It is not cross-examination for the reason it does not tend to test the accuracy of this witness's statements, or of the testimony which I have elicited; that it is strictly a part of the defense, and merely an attempt to bring out in cross-examination mat-

ters which are matters of defense: to charge us with binding effect upon which we are not entitled to be charged, and on the further ground that it is a conclusion of the witness.

The COURT.—I will sustain the objection.

Mr. SPRINGMEYER.—We except on the ground it is proper cross-examination.

The COURT.—It looks to me as though you were trying to make out your defense in the cross-examination of this witness.

Mr. SPRINGMEYER.—May it please the Court, if the direct examination of this witness permits that, it is submitted that is quite proper.

The COURT.—That is true, and if it does permit it, this question is certainly permissible; but it is for me to decide what the limits of the cross-examination are under the examination in chief, and he simply asked this witness if he employed this man, and he said he did, and he didn't go any further than that, and he said he was at work on the ranch, and that he was in the performance of the ranch duties at the time he was driving that car. He didn't go any further into the relations between this boy and the owner of the ranch; he didn't go any further into his own relations with the owners of the ranch. Now your questions are intended to go still further, and to draw out any matter that contradicts what this witness has stated, a matter which is essential to your defense as you have alleged it in your answer.

(Testimony of W. R. McCullough.)

Mr. SPRINGMEYER.—(Q.) Mr. McCullough, you testified on direct [77] examination that in July, 1919, you were employed on the Rodgers or Reservation ranches as superintendent?

A. Yes, sir.

Q. That is a fact? A. Yes, sir.

Q. Who operated, managed, or controlled the Rodgers or Reservation Ranches in July, 1919?

Mr. GOODMAN.—That is objected to, your Honor, upon the same grounds.

The COURT.—Objection sustained.

Mr. SPRINGMEYER.—We take exception on the ground it is proper cross-examination. That is all.

Testimony of Dr. William Neave Kingsbury, for Plaintiff.

Dr. WILLIAM NEAVE KINGSBURY, called as a witness by plaintiff, testified as follows:

My name is William Neave Kingsbury. Am forty-one years old. Am a physician and surgeon, graduated in 1904 at the Royal College of Surgeons, London, England, I practiced in London and in the British Army until 1919, when I came to this country. I am now practicing in Reno, Nevada. I have had an extensive experience as a radiologist, and I specialize on the taking of X-ray pictures. I have taken between thirty and thirty-five thousand such pictures.

I met J. B. Daniel, plaintiff, the day before yesterday.

(Testimony of Dr. William Neave Kingsbury.)

Question by Mr. GOODMAN.—And did you make any physical examination of him?

A. I made a thorough physical examination.

Mr. KEARNEY.—We will object to that, if the Court please, on the ground it is too remote; an examination made day before yesterday is of no concern to the Court at this time, nor the jury, some two years after the alleged accident.

The COURT.—I think it would be admissible on that point to show the extent of the injury, and duration.

Mr. KEARNEY.—If the Court please, until it is shown there has been no subsequent injury; until it is shown that the condition that existed at the time of the accident, two years ago, is the same as it is at the present time, there cannot be any connection between something that is not existent, and that existed two years ago. [78] For instance, it might appear that in the meantime numerous natural disabilities had occurred; they may be prevalent now, may occur now, and that could not be tied to something that happened two years ago.

The COURT.—Oh, I think it is admissible on the extent of the injuries which he has suffered. Of course, it should properly be based upon some testimony to the effect that the conditions to which the doctor may testify are not the result of something else, but are in consequence of the injuries which he alleges he received at the time set forth in the complaint.

(Testimony of Dr. William Neave Kingsbury.)

Mr. GOODMAN.—I considered that the plaintiff had testified he had remained at home, and had done nothing since the injury.

The COURT.—Well, he didn't testify that he hadn't fallen down, or had not been injured otherwise, or that the injuries he suffered were not due to some other causes.

Mr. GOODMAN.—I will connect it up.

The WITNESS.—(Continuing.) I took nine photographs of Mr. Daniel, of which I have prints and negatives. I made one of the right hip.

Mr. GOODMAN.—I will offer that in evidence.

The COURT.—Submit it to counsel.

WITNESS.—One moment. That print was not made by me personally; the negative was made by me personally.

Mr. GOODMAN.—Have you the negative?

WITNESS.—That is the negative. There is the negative from which print was made. (Hands to counsel.)

Mr. GOODMAN.—The negative is offered with the print.

Mr. KEARNEY.—We will object to the offer, first, upon the ground that the print is not properly identified as made by the witness; second, upon the ground both print and negative are inadmissible for the reason that they are too remote, not having been taken within a reasonable time after the alleged accident; upon the further ground that there is nothing in the record to show that the same condition did not exist prior to the accident,

(Testimony of Dr. William Neave Kingsbury.)
and there is no connection whatever that this condition, or any condition that might be shown,—anticipating that it might be shown—is the result of the alleged accident; and until and unless some X-ray condition is shown [79] that existed at the time or prior to the accident, what existed subsequent to the accident cannot in any way bind the defendant; and that the admission of X-ray pictures of this kind, under these circumstances, is prejudicial to the rights of the defendant.

The COURT.—Well, whatever is shown to be abnormal in these pictures that are admitted must in some way be connected with that accident that occurred. There is an objection made to one of the exhibits that you are offering, that it was not made by this witness; there is one that he did make, and the other is the copy of it, it is the negative, is it?

Mr. GOODMAN.—It is the negative.

The COURT.—This is correct, is it?

A. That is correct.

Q. You made that yourself?

A. I made that, and developed it.

The COURT.—That may be admitted.

Mr. KEARNEY.—We note an exception upon the grounds stated in the objection.

(The negative is marked Plaintiff's Exhibit 5.)

WITNESS.—(Continuing.) I did not make the print, but it was made in my presence, and is a correct copy.

The COURT.—It will be admitted.

(Testimony of Dr. William Neave Kingsbury.)

Mr. KEARNEY.—Same objection and exception.

(The print is marked Plaintiff's Exhibit 6.)

WITNESS.—(Continuing.) I made and have a negative and a print of the left hip of plaintiff.

Mr. GOODMAN.—If the Court please, we offer this negative and print.

Mr. KEARNEY.—We make the same objection to the offer; and also upon the further ground there is no proper foundation laid for the introduction of the prints, or negatives.

The COURT.—You add to your objection a new ground, that there is no proper foundation laid; in what respect, Mr. Kearney?

Mr. KEARNEY.—With respect to the manner of taking the X-rays, and the purpose for which they were taken, and the particular ailment or disease, whatever it might be, the prints or negatives are [80] supposed to show.

The COURT.—If there was anything improper in the taking of these X-rays, I will allow you to question the witness on that point of the objection, if you wish, before they are admitted.

(The negative is introduced as Plaintiff's Exhibit 7, and the print as Exhibit 8, over defendant's objection and exception.)

The WITNESS.—(Continuing.) I made and have an X-ray negative of the joint between the sacrum and the hip on both sides and the lower four lumbar vertebrae. The print was made in my presence and is a faithful copy of the negative.

(The negative and print were admitted as Ex-

(Testimony of Dr. William Neave Kingsbury.)

hibits 9 and 10, over defendant's objection and exception.)

The WITNESS.—(Continuing.) I made a negative of the first lumbar vertebrae, and of the dorsal vertebrae. The print was made in my presence and is a faithful copy.

(The negative and print were admitted as Exhibits 11 and 12, over defendant's objection and exception.)

WITNESS.—I made an X-ray negative of the upper nine dorsal and the lower three cervical. The print was made in my presence and is a faithful copy.

(The negative and print were admitted as Exhibits 13 and 14, over defendant's objection and exception.)

WITNESS.—I made another X-ray negative of the same part of the body because the other was not clear. The print is a faithful copy.

(The negative and print were admitted as Exhibits 15 and 16, over defendant's objection and exception.)

WITNESS.—I made an X-ray negative of plaintiff's right shoulder joint. The print is a faithful copy.

(The negative and print were admitted as Exhibits 17 and 18, over the defendant's objection and exception.)

The WITNESS.—I made an X-ray negative of the upper six vertebrae. The print was made in my presence and is correct.

(Testimony of Dr. William Neave Kingsbury.)

(The negative and print were admitted as Exhibits 19 and 20, over defendant's objection and exception.) [81]

Mr. GOODMAN.—(Q.) Doctor, you stated that you have studied the X-ray photographs that you prepared of the plaintiff? A. I have.

Q. Do the X-ray photographs, or any of them, in your opinion, derived from an examination and study you have made of them, show any unnatural conditions which may be the result of injury?

Mr. KEARNEY.—We will object to that upon the ground that the pictures are the best evidence, and show for themselves; and upon the further ground that any evidence regarding conditions existing some two years after the accident is too remove to be in any way connected with the accident, and until so connected, the admission of testimony concerning pictures or an examination made two days ago, on the 31st of May, 1921, is prejudicial to the defendant.

The COURT.—Well, it is a serious question whether the ordinary layman who has not had any training, can read these negatives and tell what they mean; and I have never seen X-ray pictures admitted in court that they were not read and explained by an expert. I think that question has never been raised yet, but if there is any question in your mind as to whether a layman can read and understand those pictures, you are at liberty to examine the witness. I think it is a matter of expert testimony. You may answer the question.

(Testimony of Dr. William Neave Kingsbury.)

Mr. KEARNEY.—We take an exception to the ruling of the Court upon the grounds stated.

WITNESS.—In several of those negatives which I took there is evidence of injury.

Mr. GOODMAN.—(Q.) Doctor, I will hand you the negatives and the prints, and will ask you if you will take the negatives or print and show the injury the photographs and the things which you mention as evidence of injury.

Mr. KEARNEY.—Object to the question upon the grounds stated in the former objection.

The COURT.—The objection will be overruled.

Mr. SPRINGMEYER.—The same exception.

WITNESS shows Exhibit 6: This shows an irregularity in the outline of the lower border of the ramus of the ischium, and of the [82] descending ramus of the pubis. That irregularity in itself would not produce any physical effect, but it is the result of peristitis of that bone, due to some injury. Exhibit 8. A similar condition. The irregularities in themselves have no detrimental effect on the patient, but they suggest strongly that the bone has been broken, and it is possible the breakage may have had some effect on the patient's bladder. He could have walked, but might have had pain. Exhibit 10. The last lumbar vertebrae is displaced about a quarter of an inch to the left, and is slightly rotated. The fourth lumbar shows evidence of breakage, the left transverse process being broken and united at an angle. The third lumbar shows evidence of fracture of the

(Testimony of Dr. William Neave Kingsbury.)

spine; the lumbar part of the spinal column is *in toto* displaced to the left, and shows a slight lateral curvature with a convexity to the left. The conditions are not normal and are not common. Injury is the only thing which will cause such conditions. The patient would have pain in the lower part of his back, probable tenderness, some difficulty in stooping and raising himself, possibly his pelvis would become tilted a little, and he would probably be unable to walk as far as if his back were perfectly normal. No treatment will cure the condition. Exhibit 16 shows a lateral curvature of the spine with a convexity towards the left, extending from the fifth cervical vertebrae to the seventh dorsal. It shows the transverse process of the seventh cervical on the left is broken and is not healed up in close apposition. The vertebrae itself is rotated so that the spine points to the left. These irregularities would in all probability cause pain in the lower part of the neck; he may possibly get tenderness at times, depending to a certain extent on the weather; he will have some limitation of movement of the neck. In all probability it will produce pain. Exhibit 20 shows irregularities and bony overgrowth of the lower border of the third cervical, irregularities and bony overgrowth of the upper border of the fourth cervical, irregularity of the upper border and anterior border of the fifth, and bony overgrowth of the upper border of the sixth. These would cause limitation in movement of the neck, pain in movement, and

(Testimony of Dr. William Neave Kingsbury.)
creaking or grating in turning the neck. There is a condition similar to [83] that which is natural, but it always starts in the lower part of the spinal column. There is no evidence in the lower part of the spinal column of this patient that he has any arthritis; and that is in my opinion a traumatic condition, a condition that results from injury. Exhibit 9 again, shows a crack on the right side, fifth lumbar, from the middle of the upper border, running downwards to the right. The crack could be produced from a blow, not by natural causes. Exhibit 12 shows the lower part of the lateral curvature of which I spoke. There is no other evidence of anything abnormal in the middle part of the back, that is in the dorsal vertebrae. The same condition is shown by Exhibit 16. Exhibit 18 is a print that does not reproduce in detail. Exhibit 17 is of the joint between the right collarbone and the right shoulder blade, and shows an irregularity of the joint surfaces with a bony overgrowth. From this, plaintiff would get pain in the shoulders. An injury would produce the condition. Exhibit 14 is the same as 16. When I was dealing with 16 I forgot to mention it shows the inner end of the right collar bone is about a quarter to half an inch lower than the inner end of the left collar bone. None of the photographs show any fracture of bones.

The effect of the irregularities and unnatural conditions to which I have testified would be to lower the general health. The man would not feel

(Testimony of Dr. William Neave Kingsbury.)
so well, there should be some difficulty in walking, some pain and tenderness in the spine, particularly the lower part. He would not be able to move his head properly, but would do so with pain, and possibly have pain in his right shoulder joint. It would shorten the distance he could walk; I would be surprised if he could walk over three or four miles at a stretch. None of these conditions are curable.

Mr. GOODMAN.—Did you find from your examination of Mr. Daniel any other unnatural conditions? A. I did.

Q. What were they?

A. I found that he had dropping of his right shoulder.

Mr. KEARNEY.—This does not go to the X-rays. [84]

Mr. GOODMAN.—No.

Mr. KEARNEY.—We will object to it on the ground it is too remote, not sufficiently connected with the date of the accident, and on all the grounds stated in the former objection.

The COURT.—The objection will be overruled.

Mr. KEARNEY.—Exception on the grounds stated.

WITNESS.—He had dropping of the right shoulder; atrophy, not complete, of the big muscle which goes down to his shoulder, the trapezius; he had a certain amount of loss of power in bringing his arm up to his shoulder; and his big biceps muscle was slightly atrophied. Atrophy diminishes

(Testimony of Dr. William Neave Kingsbury.)
the power of a muscle. It is not attended by pain, but the nerve degeneration might cause pain. I have no doubt these conditions are the result of injury.

Mr. GOODMAN.—Doctor, assuming that a man is crossing the street and is run over by a Ford car, the wheels passing over his body, and from left to right, approximately in this direction (showing); and assuming that the man before being run over was struck by the front of the car and thrown a distance of eight feet, in your opinion would it be possible for an injury of that character to produce the conditions you have testified to?

Mr. KEARNEY.—We object to the question on the ground it is based upon facts not in evidence, a hypothetical question based upon a state of facts which do not correspond with the state of facts in the record.

Mr. GOODMAN.—I have attempted, your Honor, to make them correspond. I would like Mr. Kearney to be more definite in his objection.

The COURT.—It seems to me that was about what the testimony was.

Mr. KEARNEY.—There is no testimony that he was struck and thrown eight feet away.

Mr. GOODMAN.—The plaintiff's testimony was to that effect.

Mr. KEARNEY.—His testimony to that effect was that he found his hat at a distance of eight feet.

Mr. GOODMAN.—His testimony also was that he

(Testimony of Dr. William Neave Kingsbury.)
was struck in one [85] spot, and became conscious in another spot.

The COURT.—I think I will allow that question. Of course this is an assumption, and it is an assumption from the evidence which has been introduced, and the fact that he found his hat where he did find it was evidence to him, and evidence to the jury, of how far he was thrown. I will allow the question.

Mr. KEARNEY.—Exception on the grounds stated in the objection.

WITNESS.—Such an injury could produce the conditions I found. I found also that in neither knee was there any knee jerk. On testing the soles of his feet, I found that on stimulation neither great toe responded. That would interfere with his function considerably. He walked with his feet rather far apart, and swayed from side to side. With his eyes shut and feet close together, he stood for but two or three seconds instead of a couple of minutes, as a normal person can before his body sways. These tests indicate some interference between his brain and his legs. That interference is either from the nerves just as they come out of the spinal cord, or actually in the lower part of the cord itself, where the nerves go up in the cord, and it is in that spot in my opinion this interference has taken place. The lateral displacement and injury to his column and bones, and the injury to his nerves, are both the result of the same condition, of the same injury. A man in this condition would not be able

(Testimony of Dr. William Neave Kingsbury.)
to travel from fifteen to thirty miles a day in an automobile, and actively manage a ranch.

Cross-examination.

(By Mr. KEARNEY.)

WITNESS.—I am forty-one. I came direct to Reno from London, eighteen months ago. I am a British subject. I have had an office in Reno since January 5, 1921. I took out a license to practice in Nevada in May, 1921. I have seen bony growth on other X-ray pictures I have taken. It is quite common, especially in old people. It depends upon where we find it as to whether it is in people not injured.

Mr. Daniel had two or three X-ray pictures taken before he came [86] to me. He did not tell me that those pictures did not show anything wrong. The condition of the internal structure of bones but not the position depends upon a man's age. There may be a slight difference, an eighth to a quarter of an inch, in the height of the shoulders of a normal man, without accident, in cases. I do not think much more than that. Practically nobody is absolutely symmetrical, but the differences are slight. One foot may be slightly the larger. One side of the face or skull may be slightly different than the other. If a boy carries heavy weights in one hand, one side will be affected, but not so if he begins when a man. The boy's shoulder might be half or three-quarters of an inch lower. Manual labor causes men to become stooped, but there is practically no alteration

(Testimony of Dr. William Neave Kingsbury.)

in bones, only changes in muscular development. One would have to start labor as a child in order to alter the position of the bones. After twenty-five or thirty it would be impossible to alter the position of the bones.

The irregularities in plaintiff could not be cured. The position of the bones is dependent upon muscles and ligaments, unless bones are locked together. A displacement can be cured only if cared for immediately. If allowed to run, changes take place in the muscles and bones. A normal spine is curved in one direction, but not in two. From before, backwards, it is practically a straight line. From side to side there are four curves. I can't by X-rays from different angles show any kind of curves. It does not depend entirely on the angle, but the angle of the ray has a great deal to do with what is shown on the plate. If a person stands on one leg and throws his body, an X-ray will not show the same as if the person is erect. One can show deviations from the normal, but can't show a fracture if a fracture is not there.

If there is a curve, you can exaggerate it by taking an X-ray picture from an angle. The natural back curve grows greater with age, just as does the neck curve, so that the same conditions would not exist in a man of seventy-two or three as in a young man.

As to X-ray pictures of the shoulders, a patient might so twist his spine or his side or pelvis as to affect the picture. [87]

(Testimony of Dr. William Neave Kingsbury.)

The bony growth on the vertebrae does not exist in young men. As one grows older, his bones become stiffer and his muscles less pliable. If the bony condition exists in a man's neck he could not turn his head quickly through an angle of 45 degrees without experiencing pain. The majority of people, old and young, can twist their heads through an angle of 180 degrees without pain.

Redirect Examination.

(By Mr. GOODMAN.)

I have never found the bony growth shown on the X-ray pictures of plaintiff at the same places on people who had not met with accidents. My X-ray machine is a Victor, and is a good one. When the pictures were taken, plaintiff was lying down, and I arranged his position so that there was no distortion. I took especial care that there should be as little distortion as possible.

The lowering of a shoulder does not necessarily follow hard work. With Mr. Daniel the muscular condition has everything to do with the lowering of the shoulder. The tenacity of the big muscle from the upper part of the back of the neck to the shoulder keeps the shoulder in place. If there is atrophy, that is disappearance of the muscular fibres, the muscle doesn't do everything. It is normal where it throws the shoulder forward by its own weight. The causes of atrophy are direct injury, injury to the nerves or other disease of the nerves. The test I made of Mr. Daniel showed his

(Testimony of Dr. William Neave Kingsbury.)
walking condition, his loss of knee jerk, could not be the result of disease.

There are no lateral curvatures in normal people. A lateral curvature obtains when the spine curves as you look at it from the back. The other natural curvatures are like the figure "S" long drawn out.

Recross-examination.

(By Mr. KEARNEY.)

An atrophied muscle can result only from injury or disease of the nerve. Disease of the nerve can be caused by something besides injury. Paralysis due to clot on the brain will not cause atrophy of a muscle except as the muscle becomes smaller from disuse. Disease of the nerves does not necessarily cause atrophy, but an accident will produce atrophy.
[88]

Testimony of Dr. William F. Crawford, for Plaintiff.

Dr. WILLIAM F. CRAWFORD, called as a witness by plaintiff, testified as follows:

I now reside at Oakland, California, previously in San Francisco. I am an osteopathic physician; graduated from the American School of Osteopathy in 1889. I am not licensed to practice medicine but I am for osteopathy in California. I was in Kansas two years. I am also registered there. I have practiced all the time since I graduated.

(Testimony of Dr. William F. Crawford.)

I first met Mr. Daniel in 1915. I think I treated Mr. Daniel in 1919, after he was recovering from the grippe. I didn't treat him in 1920. I keep books, but I didn't look up those particular dates. In 1919 I treated him in San Francisco. In 1920 after the accident I treated him in Antioch about a month.

I treat the spinal cord and anything in the body. There is no particular point that I direct treatment to. I treat according to what is the matter with the patient. We osteopaths give no internal drug medicine. We correct any dislocations, spinal curvature, contraction of muscular deficiency.

I could not tell without my books the days and months I treated Mr. Daniel in 1919. I gave him a course of treatment. He would come for a couple of weeks, then he might turn up in a couple of months. It wasn't any set treatment, simply a little kind of tonic treatment.

We diagnose from the spinal cord first, to see if there are spinal curvatures. And the nerve supply from the spinal cord goes out to the different organs, and the viscera, and if there is pressure on the nerves to interfere with the blood supply, we correct that. We treat mostly chronic cases, although we treat most everything that is curable. Osteopaths are authorized to treat general diseases.

In February, 1919, Mr. Daniel had a normal spine. There was a slight posterior condition and a slight

(Testimony of Dr. William F. Crawford.)

anterior condition. That is usually the result of age, see? There was no lateral curve, his shoulders were both square, no trouble with his hip. He was in average health. [89]

In May, 1920, in Antioch, I made a physical examination and treated Mr. Daniel for a month. I gave him sixteen treatments.

Q. Can you remember and can you state what his physical condition and the condition of his spine was at the time that you treated him in Antioch?

Mr. KEARNEY.—We will object to that upon the ground it is too remote from the date of the accident and from the date of the former treatment to be of any value here, it is therefore incompetent, irrelevant and immaterial; the treatment given more than a year after the first treatment is too remote from the date of the accident to be competent testimony here.

The COURT.—I will overrule the objection.

Mr. KEARNEY.—We note an exception on the grounds stated in the objection.

WITNESS.—I found his right shoulder was dropped one inch. The results, atrophy. The spinal cord had been twisted, with a double lateral curvature. The hip had been injured. The sacro-iliac articulation had been destroyed; that is an immovable joint, and it can only be moved by a tremendous shock, something like an accident. The articulation is what is called the ilium bone, that represents the back part of the pelvic bone, what

(Testimony of Dr. William F. Crawford.)

articulates with what is called the sacrum or lower part of the spine, and there is no motion to that bone; and unless the shock strikes this way, that is what is called the tuberosity of the ischium, that throws the bone forward, see? If the shock comes from the knee it throws the bone forward and backward; that is the only way that bone can be dislocated, and however slight, it is most serious because hard to correct. When dislocated, we usually find pressure upon the sciatic nerve; we always find the spine injured because it moves the bone from the spinal cord, and we have a weak spinal cord and a weak back.

With Mr. Daniel I should judge the shock was from the knee. It was slight but serious because the bone should not be moved at all. It would take a severe shock to move it.

I found a double lateral curvature in the spine, like the exaggerated [90] letter "S." It is the most serious curvature we have, outside of the extreme posterior curvature. One of the first things you notice is a depression in the nervous system, and any disturbance in the nerve force has its effect on the whole body and disturbs the blood flow, the nourishment of the body.

Q. Did you at that time in Antioch, doctor Mr. Daniel to correct any of the irregularities which you found to exist? A. My treatment—

Mr. KEARNEY.—My objection goes to all this line of testimony on the second treatment, on the grounds heretofore stated.

(Testimony of Dr. William F. Crawford.)

The COURT.—It will be the same ruling and the same exception.

WITNESS.—My treatment was directed to the shoulder. He has lost the power to hold his right shoulder up. If the Court would permit, I would bring Mr. Daniel up here, and I would demonstrate just what I mean by atrophy of the trapezius muscle.

Mr. GOODMAN.—I will ask permission of the Court to allow the expert witness to use his subject.

Mr. KEARNEY.—We will object upon the ground the witness is called as an expert, and we cannot get these demonstrations on Mr. Daniel in the record on appeal, if it should be necessary to appeal the case; I think the witness can describe what he wishes to show so that it may go in the record; and any explanation he cares to make is all right.

The COURT.—Oh, I will allow him to do so if he wishes.

Mr. KEARNEY.—We take an exception to the ruling of the Court on the grounds stated.

WITNESS.—(Illustrating on plaintiff.) When I first treated Mr. Daniel, here is where his shoulder was (indicating on plaintiff); when I treated him in 1920. Now there is a muscle called the trapezius muscle; it has its origin on the occipital bone, goes down the spine to the twelfth dorsal vertebrae, and comes out onto the shoulder; this muscle, if the shirt was off, you could see how it had wasted

(Testimony of Dr. William F. Crawford.)

away, and when a muscle atrophies, when tissue has atrophied, it is almost impossible under any treatment to restore it. That is why I found in treating him in 1920 that this was incurable, that it [91] would never be brought up as long as he lived, because this muscle is lifting the shoulder, drawing it back and pulling it down, has wasted away. It is also used in turning the head; and of course he has not got as good use of the neck as he had at one time. That is the condition that I directed my treatment to in 1920—the shoulder; and I didn't do a great deal to his spine, because at this time in life a lateral curvature cannot be cured. Then my treatment was directed to the hip. When he stands, he stands on one leg, and favors the other one; and you find the person, when they are standing apparently natural on one leg, resting the other, you suspect that the other has received an injury, that there is a weakness there; upon examining him, if you don't find a weakness in the leg, you will in ninety-nine cases out of a hundred, find a lateral curvature, I don't care who the person is.

In later years a lateral curvature cannot be corrected. Mr. Daniel cannot be cured. I look for cardiac development, cardiac trouble with him. Cardiac trouble is any trouble that may develop in heart, interfere with the nervous system, which is the basis or force which controls the blood, and the goes with it. It furnishes the motor power for the blood supply, and anything that interferes with blood cannot flow unless there is a little nerve that

(Testimony of Dr. William F. Crawford.)

the nerve force disturbs the action. The lateral curvature starts between the shoulders, runs off a little (indicating), then goes this way, see? So it takes what is called the cardiac flexus, or nerve supply to the heart. In 1920 Mr. Daniel had no cardiac disturbance.

I think Mr. Daniel is very apt to lose the reflexes; the reflex striking this nerve causes the knee jerk, and when you lose the reflexes you don't have full control of your feet. You are not absolutely sure when you have them in the right place.

Cross-examination.

(By Mr. KEARNEY.)

WITNESS.—I am not a practicing M.D., and not authorized to prescribe medicine. My treatment is adjustatory. I stretch the muscles, I pull them and twist them, and so on. There is no rubbing. The adjustment of the bones is the same way. I have no [92] means of determining a fracture except by the feel. I did not take X-rays. I can determine just how each vertebrae and bone is without an X-ray. The X-ray is valuable, but is not the only way. I might make a mistake in diagnosis of a fracture, but not in dislocation unless the person is very stout.

I tell any slight twist in a bone by mensuration, measuring from fixed anatomical points; palpation and inspection.

I treated Mr. Daniel. I met him in 1915, and I treated him a couple of times after that. I treated

(Testimony of Dr. William F. Crawford.)

him both times in 1919. I treated him twice then. I am not sure I treated him before 1919, but I treated him twice, though, before the accident, or three different times. Probably in February, 1919. It was after 1915.

I first met Mr. Daniel in Solano County, California. I was just introduced to him while there was a real estate boom. I did not become specially well acquainted with him. We never called socially. He called on me professionally. I am acquainted with some of his people, in fact, I have treated a relative of his, an elbow relative so to speak, and I suppose he found out that way.

In 1920 I went out of practice. The last part of 1919 or 1920 I had the flu and had to quit practice. I never practiced in Solano County. I treated Mr. Daniel in San Francisco, with the exception after the accident in Antioch, Contra Costa County. I have no license there, but if a friend comes to me, why I treat them. I am not really in the practice now, because I have not wholly recovered from the flu. I did not have an office in Antioch. I have never discussed this matter with Mr. Daniel, except I measured his shoulder to see if it had dropped any more, just before I came over. I have been with him considerably since I arrived but have not discussed the matter with him at all. There was no need.

The first time I treated Mr. Daniel for insomnia; the second time he was recovering from the effects of the grippe. For insomnia I gave him a pallia-

(Testimony of Dr. William F. Crawford.)

tive, manipulative treatment. Generally an osteopath works on the nervous system. Men go to osteopaths who have dislocated bones and muscles and are not in proper shape. For other ailments they go to regular physicians. [93]

In a palliative treatment for insomnia, we have to get a better distribution of the entire nervous forces; whenever you increase the blood flow, increase the nerve forces, you restore the natural functions of the body. In Mr. Daniels I found what we generally find in people as they grow older. He was just a little bit under, just a little bit run down. As near as I could tell, it was February, 1919. He told me he was troubled with sleep in a high altitude. I simply treated him to get a better function of his nervous system, and better function of the blood flow. I manipulated his spinal cord, by putting him on his side on the table. For instance, you raise the arm up, and get under the ribs, and gradually lift the ribs, and that gives the heart action a little more room to beat, and increases the blood flow; and then you manipulate the liver, get a better action of bile flow; that increases the digestion, helps the bowel action. The whole thing is restoring the functions. I get the patient on the side, and I put his arm over mine, then I manipulate the spine all the way down, see, lifting the ribs a little bit; by lifting the ribs that relieves the intercostal pressure, see. On both sides of the body. I get him on his back, and manipulate the liver, gradually getting the function re-established, getting a

(Testimony of Dr. William F. Crawford.)

better function, see. And that is the method I use in the palliative treatment. I twist his body back and forth, and I manipulate his neck too. It takes about three-quarters of an hour. As a rule Mr. Daniel came about every other day. I treated him about two weeks in February, 1919. Probably three or four months later he came in. He was just recovering from the grippe.

In that case I put an electric pad on the table and get the patient on it, and put another pad on top, and put a quilt over, and turn on the electricity and apply heat. It opens the pores and brings the blood to the surface. It is good for chills or anything of that kind. I treated him about two weeks, a half to an hour daily.

The next time I treated Mr. Daniel was in Antioch, in April, 1920. I examined him in April and treated him in May. I took about two hours for the examination. I measured his shoulder bone. Examined [94] his spine, taking a pencil to mark each vertebrae to see if any was out of line. I measured the crest of the ilium bone, on the level with the fourth vertebrae. The posterior superior spine of the ilium is on a direct line with the second sacral vertebrae. I draw and mark across these, and if there is any deviation, if they are not in the exact level, I know there is something wrong. Then by palpation or depression, I felt that stiffness and soreness, and I discussed what part of his leg hurt most. I think that was enough.

(Testimony of Dr. William F. Crawford.)

On that day Mr. Daniel came for my deposition. He told me he had been in an accident, run over by an automobile.

There are three ways of determining about the spine. One by measurement, one by palpation, and the other by inspection. If you have a trained eye, just as you look at the spine you know whether there is a curve there or not. You determine the extent with a pencil. I know he had a straight spine in 1919. If you run your fingers down the spine, which I always do, if any vertebrae is moved to one side or the other, your finger runs over that, see. If a man told you he had been in an accident, I would make a thorough examination. In 1919 I did not make a thorough examination because he came to me for general constitutional treatment. He didn't tell me there was anything wrong, and there wasn't anything the matter to discover. If there had been in treating him I would have discovered it.

In 1919 his heart was all right, and I think it is all right now. In April, 1920, it was beating too fast. There was no cardiac trouble whatever in 1920.

A man standing on one leg could get lateral curvature of the spine. When a man stops, he will get in the position that rests him most, and upon examining his spine you will find a lateral curvature. Standing on one leg produced it. I find that quite often in the practice in old people or children. In children it is usually from work, carrying books

(Testimony of Dr. William F. Crawford.)

on one side, sitting in a false position. Standing on one leg exaggerates it. The entire spine is twisted in that way into a lateral curvature. A lateral curvature, even in a child, is serious and leads to most anything. Curves come [95] on slowly unless from accident and when long standing can't be corrected. In old people you can't correct them even if you begin treating them immediately because in them is the inter-vertebrae disc or cushion that atrophies and wastes away, and lets the spinal column settle down, and you don't have the flexibility. If there is an accident to-day, and no fractures and not too much laceration of the tissues and the accident were not too severe, you could correct the condition if you began treatment immediately.

A normal healthy man has a pretty good spine. sometimes fleshy people are the worse off, but as a rule one in constant pain or troubled with insomnia does not take on weight.

I treated Mr. Daniel a month in May, 1920, at Antioch. I made sixteen visits, and charged three dollars a visit. As I had no office, I went to his hotel. He never came back for further treatment. I don't think I treated him in 1915, 1916, 1917, or 1918.

Q. Now, isn't it a fact, Doctor, that you testified on the 30th day of April, 1920, before a notary public at Antioch, in reply to a question as follows: "Have you ever treated Mr. Daniel professionally"? Your answer was: "Yes, off and on since 1915; the

(Testimony of Dr. William F. Crawford.)

last time I treated him was in February, 1919,"
Did you so testify?

A. If it is in the deposition I did.

Q. I will ask you if you did not in reply to the following question as I read it, testify: "For what did you treat him in February, 1919? At that time I gave him a general constitutional treatment; there wasn't any special or particular thing which I treated him for that time that I remember of."

A. Yes.

Q. Now how do you remember that you treated him for insomnia? A. Now, that—

Q. Just state whether or not you so testified.

A. I testified to that, yes. But that particular thing wasn't put in, that was all. Insomnia wasn't put in probably; it should have been in there, it should have been put in. [96]

Redirect Examination.

WITNESS.—For insomnia I gave the general constitutional treatment. The examination of the spine shows the patient's condition; you can determine bronchial trouble; you can determine spleen trouble; you can determine liver trouble, because the nerve supply to those different organs have their origin in the spine. The examination may be for malignant growth in the abdomen, methods of palpation to locate the growth. The spine is only one method of diagnosis. I don't believe in tonics, instead I give a palliative treatment. Standing on one leg produces spinal curvature and is a symp-

(Testimony of J. B. Daniel.)

tom of spinal curvature. Where a person has an injury to the hip, why they stand on one leg, and the curvature results from that.

I would not perjure myself for my best friend.

Testimony of J. B. Daniel, for Plaintiff (Recalled).

J. B. DANIEL, plaintiff, recalled.

WITNESS.—I have not had any other physical accidents or injuries since I was run over by the automobile in 1919. Dr. Crawford treated me in February, 1919.

Mr. GOODMAN.—If the Court please, we desire to offer in evidence the original complaint in this action in connection with the original answer of the defendant herein. It is offered for the purpose of showing the admissions which the defendant has made in the verified answer to the verified complaint; and particularly the admission of the third paragraph of the complaint; and it is necessary to introduce both the complaint and the answer for the reason that the answer is: "Third. Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained."

Mr. SPRINGMEYER.—We object, may it please the Court, to the admission of these pleadings, on the ground that judicial admissions, which these are, are never admissible in evidence as such.

The COURT.—Did she swear to the answer?

Mr. SPRINGMEYER.—Yes, may it please the Court.

Mr. GOODMAN.—Personally.

(Testimony of J. B. Daniel.)

Mr. SPRINGMEYER.—She swore to the answer, that is true. As I [97] understand the rule—it is laid down in Wigmore—pleadings as such, are never admissible in evidence. This is what he says at section 1064: (Reads:)

“The pleadings in a cause are, for the purpose of use in that suit, not mere ordinary admissions, but judicial admissions; i. e. they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues.”

That is the ground of our objection. I don't think it is ever proper to offer pleadings in a case, in evidence.

(Discussion.)

The COURT.—I shall overrule the objection.

Mr. SPRINGMEYER.—We will take an exception on the grounds stated in the objection, if the Court please.

Mr. GOODMAN.—Plaintiff rests.

Mr. SPRINGMEYER.—May it please the Court, if plaintiff rests we move the Court for nonsuit upon the following grounds: That the plaintiff has failed to prove a sufficient case for the jury in the following particulars:

First. That the evidence on behalf of plaintiff affirmatively shows the driver of the automobile which struck plaintiff used due care and caution, and was not negligent.

Second. That the evidence introduced on behalf

(Testimony of J. B. Daniel.)

of the plaintiff affirmatively shows plaintiff was negligent.

Third. That the evidence for plaintiff shows affirmatively that plaintiff had the last clear chance to avoid the injury.

Fourth. That the evidence for plaintiff affirmatively shows that the driver of the automobile was not an agent, servant or employee of defendant.

Fifth. That there is no evidence in the case which shows that defendant, Millie Evans, designated in the complaint, or Millie Rodgers, as she says her true name is, was in any way responsible for the operation of the automobile, or that she was the employer of the driver of the automobile, or that the driver of the automobile was in any sense responsible to her for his action, or under her control. [98]

The COURT.—Are any of those matters admitted in the answer?

Mr. SPRINGMEYER.—The only matter admitted in the answer is this, may it please the Court, that the Reservation or Rodgers Ranches were owned by the defendant. Now the law is that ownership of property, for instance, ownership of the automobile driven by Fred Davis, does not create a presumption of the relationship of agency, or of master and servant. That I think is well established under the law.

(Argument.)

(At 4:00 o'clock P. M., the jury is admonished and excused until to-morrow morning at 10:00 o'clock.)

(Argument resumed and concluded.)

The COURT.—The motion for a nonsuit will be denied.

Mr. SPRINGMEYER.—Defendant excepts to the denial of the motion for a nonsuit upon all the grounds stated in the motion, and under the facts as proved by plaintiff, submits the motion should be granted.

Testimony of W. R. McCullough, for Defendant.

THEREUPON Mr. W. R. McCULLOUGH was called to testify as a witness for the defendant, and upon being first duly sworn, testified as follows:

My name is W. R. McCullough.

Mr. McCullough was then asked the following question: If you know, whose money was paid you for services rendered by you on the Rodgers or Reservation Ranches in Pershing County, Nevada, during July, 1919?

Objection was made by plaintiff's attorney on the ground that it calls for a conclusion and that no proper foundation has been made. The Court sustained the objection of the plaintiff.

The witness was then asked if he knew whose money was paid him for services rendered on the Rodgers or Reservation Ranches during July, 1919, to which he answered "Yes."

The witness was then asked the question:

(Testimony of W. R. McCullough.)

“Whose money was paid you for services rendered on the Rodgers or Reservation Ranches in Pershing County, Nevada, in July, 1919?” to which the plaintiff’s attorney objected on the ground that it is a special defense of the defendant and it is not a preliminary question [99] and calls for a conclusion. The Court overruled the objections, and the witness answered that it was the money of Elizabeth A. Rodgers that was paid him for services.

Thereupon the following question was propounded to the witness:

“Do you know whose money was paid Fred Davis for services rendered by him in the driving of the automobile in connection with the Rodgers or Reservation Ranches during July, 1919,” to which he replied “Yes, sir.”

The witness then stated that: Mrs. Elizabeth A. Rodgers furnished the money; that I was in the employ of Mrs. Elizabeth A. Rodgers during July, 1919; that Fred Davis, the driver of the Ford automobile was in the employ of Mrs. Elizabeth A. Rodgers in July, 1919; that it was Mrs. Elizabeth A. Rodgers’ money which paid for supplies used upon the Rodgers or Reservation Ranches during July, 1919, and that it was Mrs. Elizabeth A. Rodgers’ money that was paid to Fred Davis for his services in driving the Ford car in question used in the operation of the Rodgers or Reservation Ranches during July, 1919.

(Testimony of W. R. McCullough.)

Thereupon the following question and answer were propounded and given:

“Who controlled the operation of the Rodgers or Reservation Ranches during July, 1919? A. Mrs. Elizabeth A. Rodgers.”

Thereupon the following took place:

The COURT.—Wait a moment.

Mr. GOODMAN.—The objection goes to that.

The COURT.—That is purely a conclusion, it seems to me.

Mr. GOODMAN.—And I want to renew my objection to the entire examination, as stating conclusions as to whose money, without stating how he knows.

The COURT.—He says he knows, and he said that it was her money. I cannot say now that he don't know. That is a matter for you to draw out on cross-examination. If you want to examine him in advance of these questions, I will permit you to do so; but when he says he knows I cannot presume in advance that he only knows from hearsay.

The witness further testified: “Mrs. Elizabeth A. Rodgers gave [100] me instructions in the control and operation of the Rodgers or Reservation Ranches during July, 1919.”

The objection of Mr. Goodman, on the ground that it calls for a conclusion, was sustained to the following question:

“To whom, if any one, were you responsible for your service and operation of the Rodgers or Reservation Ranches during July, 1919?”

(Testimony of W. R. McCullough.)

The witness McCullough then testified: "I reported to Mrs. Elizabeth A. Rodgers regarding the control of said ranches during July, 1919, and Mrs. Elizabeth A. Rodgers gave me instructions as to the operation and management thereof during July, 1919."

Continuing the witness testified: "Fred Davis has been in my employ driving the Ford automobile for a little more than a month prior to July 28, 1919."

The witness was then asked the following question, to which objection was made, with the following ruling and remarks of the Court:

"Did you see him drive and operate the car at various times?"

Mr. GOODMAN.—That question is objected to as immaterial and irrelevant; and on the ground that it cannot be preliminary to laying any foundation for showing competency.

The COURT.—What is the purpose of that question?

Mr. KEARNEY.—The purpose is to show that the boy was competent to drive the car.

The COURT.—In spite of the statute?

Mr. KEARNEY.—Absolutely, your Honor.

The COURT.—If you show the boy was competent, the statute becomes void?

Mr. KEARNEY.—No, I don't take that view of the law. We are prepared to argue the question now, if the Court wants to hear it.

The COURT.—Yes, I would like to hear it.

(Argument.)

The COURT.—I don't think there would be any question in this case, no matter who was driving the car, if the accident was due to Mr. Daniel's own carelessness, he could not recover; but I would like [101] to see some decision, and undoubtedly you have one, which defines the effect of the failure to obey a statute of this kind, which makes it a misdemeanor for any one under the age of sixteen years to drive a car, when the accident is undoubtedly due either to the carelessness of the man who is injured, or to some negligence on the part of the driver. I don't think that statute makes a particle of difference with the rights of these parties under the law of contributory negligence.

(Argument.)

The COURT.—You may direct your examination to some other point in the case, and we will take this question up later.

Mr. McCullough, the witness, then stated: "Fred Davis was driving an old Ford car, of 1913 model, on July 28, 1919, and it would run, that is about all. I do not know the limit of speed of the car. Fred Davis worked on the car repairing it."

The witness McCullough further testified: "I know Mr. Daniel and saw him on or about the 28th day of July, 1919, in the evening at the plaintiff's home and that within three or four days after the accident I saw the plaintiff Daniel again driving down the road between Lovelock and the Rodgers

ranch. That the plaintiff had two or three children in the back seat of the car and that the plaintiff's wife was in the front seat with him, but I did not talk with the plaintiff at that time. That on the night of July 28, 1919, I talked with the plaintiff. He said he was more or less bruised up but that he would be all right in a day or two. That three or four days after July 28, 1919, the plaintiff was driving an Oakland car and stopped at the Rodgers Ranch leaving the children there for a short time to play with my children. Subsequent to that time I have seen him around Lovelock quite frequently driving a car and I observed no difference in the plaintiff's manner or method of driving the car then prior to July 28, 1919.

That I met the plaintiff on the road many times; I met him on the streets of Lovelock frequently after July 28, 1919. I know Dr. Smith of Lovelock, Nevada, who visited the plaintiff on July 28, 1919, and he was in Lovelock on last Saturday prior to the trial. [102]

I have seen and know Mrs. Rodger's signature, and the check marked Defendant's Exhibit "A," reading as follows:

Defendant's Exhibit "A."

"Lovelock, Nevada, July 28, 1919.

No. 364.

LOVELOCK MERCANTILE BANKING
COMPANY.

94-29

RODGERS Pay to Lovelock Mercantile Banking
RANCH Co. or order \$3000.00. x x x THREE
Lovelock THOUSAND DOLLARS ONLY x x x
Nevada Pay Roll a/c

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Jul. 30, 1919.)

is a check which I received from Mrs. Rodgers for pay-roll account upon my request.

The Rodgers Ranch designates a ranch located in Pershing County near Lovelock, Nevada; it is not a corporation so far as I know. It simply designates the ranch owned by Mrs. Rodgers at Lovelock, at least operated by her.

I purchased supplies from the Lovelock Mercantile Company while superintendent. The instrument, Defendant's Exhibit "B," you hand me contains Mrs. Rodgers' signature. It is a check reading as follows:

Defendant's Exhibit "B."

"Lovelock, Nevada, July 28, 1919.

No. 358.

**LOVELOCK MERCANTILE BANKING
COMPANY.**

94-29

RODGERS Pay to Lovelock Mercantile Co. or
RANCH order \$122 52/100. x x x One Hundred
Lovelock Twenty-two Dollars Fifty-Two Cents
Nevada x x x RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

Nevada Paid Jul. 30, 1919.)

The money of the first check, Defendant's Exhibit "A," was used for the pay-roll account by myself. The other checks were used to pay the bills for the current month.

Defendant's Exhibit "C" is a check signed by Mrs. Rodgers used for the payment of bills; the check is marked Defendant's Exhibit "C," which reads as follows: [103]

Defendant's Exhibit "C."

"Lovelock, Nevada, July 28, 1919.

No. 359.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Hobart Estate Company or
RANCH order \$10 24/100. x x x Ten Dollars

Lovelock Twenty-Four Cents x x x Dollars

Nevada RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Aug 5, 1919.)

Defendants, Exhibit "D," a check, is signed by Mrs. Elizabeth A. Rodgers, used for the account of Harris Manufacturing Company to pay bills, which reads as follows:

Defendant's Exhibit "D."

"Lovelock, Nevada, July 28, 1919.

No. 360.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Harris Manufacturing Co. or
RANCH order \$198 60/100. x x x One Hundred

Lovelock Ninety Eight Dollars Sixty Cents x x x

Nevada Dollars. RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Aug. 1, 1919.)

Defendant's Exhibit "E" is another check signed

by Mrs. Elizabeth A. Rodgers, which reads as follows:

Defendant's Exhibit "E."

"Lovelock, Nevada, July 28, 1919.

No. 361.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Overland Garage or order
RANCH \$338 45/100. x x x Three Hundred
Lovelock Thirty Eight Dollars Forty-Five Cents
Nevada x x x Dollars.

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Jul. 30, 1919.)

Defendant's Exhibit "F" is another check signed by Mrs. Elizabeth A. Rodgers, and reads as follows: [104]

Defendant's Exhibit "F."

"Lovelock, Nevada, July 28, 1919.

No. 363.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to Nevada Packing Company or
RANCH order \$71 43/100. x x x Seventy-One
Lovelock Dollars Forty-Three Cents x x x Dol-
Nevada lars.

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

Nevada Paid Jul. 31, 1919.)

(Testimony of W. R. McCullough.)

Defendant's Exhibit "G" is another check containing the signature of Mrs. Elizabeth A. Rodgers, which reads as follows:

Defendant's Exhibit "G."

"Lovelock, Nevada, July 28, 1919.

No. 358a.

LOVELOCK MERCANTILE BANKING

COMPANY.

94-29

RODGERS Pay to C. F. Erickson or order
RANCH \$27 25/100. x x x Twenty-Seven Dol-
Lovelock lars Twenty-Five Cents x x x Dollars
Nevada

RODGERS RANCH.

ELIZABETH A. RODGERS."

(Lovelock Mercantile)

(Banking Co. Lovelock)

(Nevada Paid Jul. 31, 1919.)

Thereupon the following question was propounded to the witness:

Mr. KEARNEY.—Did you receive any supplies as superintendent for Mrs. Rodgers from the Lovelock Mercantile Company in July, 1919? A. Yes.

Mr. GOODMAN.—I object to the form of question "as superintendent for Mrs. Rodgers," it states a conclusion which is not in evidence.

The COURT.—I will sustain the objection to that question.

Mr. KEARNEY.—(Q.) While in the employ of Mrs. Elizabeth A. Rodgers, during the month of July, 1919, did you purchase for the Rodgers Ranch

(Testimony of W. R. McCullough.)

in Pershing County, Nevada, any supplies from the Lovelock Mercantile Company?

Mr. GOODMAN.—I object, if your Honor please, on the same ground. The question is framed to get an answer to a conclusion; when you were in the employ of Mrs. Elizabeth A. Rodgers; that is a question on direct examination. He may testify as to who hired him, where he was working, what he did there, but he cannot testify to [105] the conclusion for whom he did it. It is a conclusion to be arrived at by the court and by the jury, not by the witness.

Mr. KEARNEY.—It is during the course of his employment for the Rodgers Ranch.

The COURT.—It seems to me these facts should be placed before the jury, for the jury to draw their own conclusion. You are attempting to prove that Mrs. Rodgers, rather than the defendant in this case, was the person who employed Fred Davis, and you are attempting to prove it by the way in which the property was managed; it seems to me the naked facts should be placed before the jury, so that they can draw their conclusions.

Mr. KEARNEY.—(Q.) You have already testified that Mrs. Elizabeth A. Rodgers gave you instructions as to the operation and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada?

(Testimony of W. R. McCullough.)

Mr. GOODMAN.—I object, may it please the Court. He might state what his instructions were, but I object to the question as calling for the conclusion that it was pursuant to instructions.

The COURT.—I think so, too. Why can't you have him testify that he bought certain things, and show what he did, instead of attaching to the question an answer which brings out a conclusion of the witness, or brings out his opinion. Ordinarily these objections would not receive much consideration, but in this particular case the relationship between this witness and Mrs. Rodgers or Mrs. Evans, and between Fred Davis and Mrs. Evans or Mrs. Rodgers, is a very important issue, and you are attempting to prove it by circumstantial evidence. I think the circumstances should go to the jury, without the conclusions of the witness. I want to let you prove all the facts you can, showing what was done on that ranch, but I think you had better divorce your questions from the conclusions.

Mr. KEARNEY.—We take an exception to the ruling of the Court.

I purchased supplies for the Rodgers Ranch from the Lovelock Mercantile Company during the month of July, 1919, which were delivered to the Rodgers Ranch. They were paid for. I bought the [106] supplies, got the bills, O. K'd them, mailed them to Mrs. Elizabeth A. Rodgers and she paid the bills.

Mr. GOODMAN.—I object and move the last part of the answer "and she paid the bills" be

(Testimony of W. R. McCullough.)

stricken because that is not shown to be from the witness's own knowledge, simply a conclusion.

The COURT.—That may go for the present.

The money represented by check marked Exhibit "A" marked "Payroll" was paid out in wages by me personally. I paid it to the men employed on the Rodgers Ranch. I paid Fred Davis with part of it for his services during the month of July, 1919.

Thereupon, on cross-examination of Mr. McCullough by Mr. Goodman, the witness testified as follows:

No other person signed a similar instrument to this check for the Rodgers Ranch during the month of July, 1919; there were no other checks during that month. There were other checks no doubt in relation to the ranch business for the payment of bills signed by Mrs. Rodgers. I haven't those checks. She was at that time the only one who paid the bills. I would not swear that nobody signed the checks but your question was whether anybody ever signed a similar check to that. I could not swear that no one signed one similar in form.

Mr. GOODMAN.—(Q.) When were you first employed on the Rodgers or Reservation Ranches?

Mr. SPRINGMEYER.—Objected to on the ground it is not proper cross-examination. The direct examination was limited to his employment during the month of July, 1919, and it is immaterial.

The COURT.—I will allow that question.

(Testimony of W. R. McCullough.)

Mr. SPRINGMEYER.—We take an exception on the ground stated in the objection.

WITNESS.—When was I first employed there?

Mr. GOODMAN.—Yes.

WITNESS.—I went to work there on the 15th day of May, 1917.

Q. And will you state by whom you were employed on the 15th day of May, 1917; that is, with whom you made the agreement of employment? [107]

Mr. SPRINGMEYER.—It is not proper cross-examination and objected to on that ground; it does not apply to matters brought out on direct examination.

The COURT.—Your contention is that he was in the employment of Mrs. Elizabeth A. Rodgers and he has testified to that.

Mr. KEARNEY.—He has testified that he was in her employment during the month of July, 1919.

Mr. SPRINGMEYER.—All our questions were limited to the month of July, 1919, and we expressly limited the time in each of the questions.

The COURT.—Did you object to that question?

Mr. GOODMAN.—Yes, I objected to all the questions by whom he was employed.

The COURT.—Well, if I overruled that objection, I think under the circumstances that is a conclusion.

Mr. GOODMAN.—I am asking with whom he made his arrangement for employment.

(Testimony of W. R. McCullough.)

Mr. SPRINGMEYER.—We object to that on the further ground it calls for a conclusion of law.

The COURT.—Has he testified with whom he made the arrangements?

Mr. SPRINGMEYER.—No, not on direct examination. There is no evidence as to who he made the arrangement with.

The COURT.—Well, I think under the circumstances I should have sustained the objection when he testified that he was in that employ, because that would be a conclusion. You are both highly technical in this matter, and we must keep out all the conclusions; so that conclusion will have to be stricken unless he can inquire as to the relation of employer and employee between him and Mrs. Rodgers and when it arose; so that will all be stricken out.

Mr. GOODMAN.—What will be stricken?

The COURT.—His answer to the effect that he was in her employ during the month of July, unless the question will be permitted as to when he entered into that employment.

Mr. GOODMAN.—If the Court please, there is a definite theory I am proceeding on. If the Court cares to know my theory, it will [108] probably throw light on the examination. The theory on which I am proceeding is that I expect to draw from the witness the fact that he received orders from different persons on this ranch during the time that he was there; and from that urge the conclusion that if Mrs. Rodgers was anything, that

(Testimony of W. R. McCullough.)

she was merely a manager for her daughter, the same as her daughter had employed other managers.

The COURT.—I think I will change that ruling; and the testimony that he was employed during that month will be stricken, and you can question him as to the facts constituting his employment, and how he came into her employment.

Mr. GOODMAN.—(Q.) The first date you gave me was the 15th of what? A. 15th of May, 1917.

Mr. KEARNEY.—We take an exception to the ruling of the Court on the grounds stated.

The COURT.—The exception will be noted.

Mr. GOODMAN.—(Q) On the 15th of May, 1917, you had a conversation relative to employment on the Rodgers Ranch with a Mr. Ramsey, did you not?

Mr. SPRINGMEYER.—Objected to as not proper cross-examination; there is nothing in the record regarding that brought out in the direct examination.

The COURT.—It may be used for impeachment, I don't know.

Mr. SPRINGMEYER.—There can be no impeachment of any matter not brought out on the examination in chief.

The COURT.—That is true. I don't know what it is, and I don't imagine there is any purpose in contradicting him in what he has not said.

Mr. SPRINGMEYER.—We take an exception to the ruling of the Court on the grounds stated in the objection.

(Testimony of W. R. McCullough.)

The COURT.—You may have an exception. You may answer. Read the question.

(The reporter reads the question.)

Mr. SPRINGMEYER.—We object on the further ground it is hearsay.

The COURT.—Answer that yes or no. [109]

A. No.

Mr. GOODMAN.—(Q.) Did you have a conversation relative to your employment on the Rodgers Ranch as superintendent with Mr. Ramsey before that date, or approximately that date?

Mr. SPRINGMEYER.—Objected to as not proper cross-examination, immaterial, and not binding on the defendant.

The COURT.—The objection is overruled. Answer the question yes or no. A. I did.

Mr. GOODMAN.—(Q.) And in that conversation you agreed to—

The COURT.—If you are going to use it for the purpose of impeachment you will have to state when and where the conversation occurred, and just what he said.

Mr. GOODMAN.—(Q.) Where did you have this conversation, Mr. McCullough?

A. In the Riverside Hotel, in Reno.

Mr. SPRINGMEYER.—We object as not proper cross-examination. To save time we will except to all this line of questioning. May it be understood that objection is made and exception taken?

The COURT.—No, I would rather you would except to each one. It is always permissible to

(Testimony of W. R. McCullough.)

show that the witness on the witness stand has made statements elsewhere not in harmony with statements he has made on the stand, and it is on that theory I am allowing these questions; but there may be some other objection that is valid.

Mr. KEARNEY.—Exception to the ruling.

Mr. GOODMAN.—(Q.) Who was present, if anybody, besides yourself and Mr. Ramsey?

A. Nobody.

Mr. GOODMAN.—He said he was employed on the Rodgers Ranch or got his employment from Mrs. Elizabeth A. Rodgers. Is that still in the record?

The COURT.—Yes, that is still in the record.

Mr. GOODMAN.—Now I desire to show that his first employment was not by Mrs. Elizabeth A. Rodgers on the ranch when he originally went to the ranch.

The COURT.—You may go into the question as to when he was employed and how he was employed.
[110]

Mr. SPRINGMEYER.—That was objected to, your Honor, and your Honor sustained the objection.

Mr. GOODMAN.—How did you happen to first go on the Rodgers Ranch and superintend it?

Mr. SPRINGMEYER.—Objected to on the ground it is not cross-examination.

The COURT.—I will allow the question.

Mr. SPRINGMEYER.—Exception on the grounds stated in the objection.

(Testimony of W. R. McCullough.)

Mr. KEARNEY.—Is that limited to the ranch or to the employment by Mrs. Rodgers?

Mr. GOODMAN.—To the Rodgers Ranch.

Mr. KEARNEY.—We object to that on the ground it is not within the scope of direct examination.

The COURT.—It strikes me it is perfectly within the limits of your cross-examination. You may answer the question.

A. I hired to go there as superintendent.

Mr. GOODMAN.—By whom was the offer made to you?

Mr. SPRINGMEYER.—Objected to on the ground it is not cross-examination.

The COURT.—Objection overruled.

Defendant excepts.

A. G. H. Ramsey.

Mr. GOODMAN.—(Q.) And you accepted the offer, and went there? A. I did.

Q. After going there did you take orders from Mr. Ramsey as to the management of the ranch?

A. I did.

Mr. SPRINGMEYER.—Objected to as not proper cross-examination.

Objection overruled. Defendant excepts.

Mr. GOODMAN.—(Q.) And for what period of time after you went there did you continue to take your instructions from Mr. Ramsey as to the management of the ranch?

A. Until the first day of March, 1919.

Q. Did you see any checks previous to the first

(Testimony of W. R. McCullough.)
day of March, 1919, [111] printed in form similar to the checks that are in evidence?

Mr. SPRINGMEYER.—Objected to as not proper cross-examination.

The COURT.—I will allow the question.

Mr. SPRINGMEYER.—Exception on the grounds stated in the objection.

A. I did.

Mr. KEARNEY.—I move the answer be stricken for the purpose of making a further objection. The question calls for his opinion as to whether or not similar checks were drawn. Now, they may be similar in some respects, but if they are not identical, with the exception of the signature, etc., I don't think it is a proper question.

Mr. GOODMAN.—I said similar in printed form.

Mr. KEARNEY.—In printed form. All right.

Mr. GOODMAN.—(Q.) Were any of those checks signed by Mr. Ramsey? A. Yes.

Q. As a matter of fact, Mr. McCullough, he signed practically all of them, did he not?

A. All of them up to the first day of March, 1919.

Q. During that time did you ever see a check which was signed by Millie L. Evans personally, drawn on the Rodgers Ranch at all?

Mr. SPRINGMEYER.—Objected to on the ground it is not cross-examination.

Objection overruled. Defendant excepts.

A. No.

Mr. GOODMAN.—(Q.) Did you at any time during your entire employment on the ranch ever see

(Testimony of W. R. McCullough.)

a check drawn on the Rodgers Ranch, similar to this, signed by the defendant, Millie L. Evans?

A. No.

Mr. SPRINGMEYER.—Exception on the same grounds, on the ground it is not cross-examination.

The COURT.—He has answered no.

Mr. SPRINGMEYER.—I move the answer be stricken until the exception is noted.

The COURT.—Well, the exception will be noted.

The check of \$3,000.00, Exhibit “A,” was used for the pay-roll. [112] Some checks were mailed direct to me and others mailed direct to the parties, I cannot say which they were. I can swear positively that the \$3,000.00 represented by Exhibit “A” was all used for pay-roll account; I paid out the entire sum myself. The account in the Lovelock Mercantile Banking Company is kept in the name of the Rodgers Ranch pay-roll account. The bills which I paid as superintendent while on the ranch were drawn on the pay-roll account.

Fred Davis’ mother telephoned to me, and I told her to send her son out and he came down and went to work. His duties required him to bring supplies to the ranches and men back and forth from town.

I would like to make a little correction to the checks as I stated this morning. The checks signed by Mr. Ramsey that I saw, and I believe there were all the same, contained the printed words beneath the signature “general manager.” The checks issued by me in payment of the pay-roll account contained the printed statement that it was for ser-

(Testimony of W. R. McCullough.)

vices rendered. The word "manager" appeared on the checks while I was employed under Mr. Ramsey.

Q. Did your own name appear on that pay-roll?

A. Yes, sir.

Q. And you paid this from the funds which were deposited to the Rodgers Ranch account in the bank to pay-roll account? A. I did.

Q. You did that each month, did you not?

A. I did.

Q. And every month while you were employed on the ranch you were paid from the Rodgers Ranch pay-roll account? A. I was.

Q. And the Rodgers Ranch pay-roll account was kept in the bank under the same name all the time you were employed there, wasn't it, Mr. McCullough?

Mr. SPRINGMEYER.—Objected to on the ground it is not proper cross-examination, and is immaterial.

Objection overruled.

Mr. SPRINGMEYER.—We take an exception on the grounds stated in the objection.

Mr. GOODMAN.—(Q.) Did you answer?

A. I cannot answer that positively. [113]

I drew the checks each month. I cannot specify the articles I bought from C. F. Erickson in July, 1919. I don't know the amount of merchandise I purchased in July, 1919; I don't try to remember those things. I have explained to you here before in answer to a question heretofore similar to that,

(Testimony of W. R. McCullough.)

that I O. K.'d the bills and they were paid and the receipts returned to me by the parties those checks were sent to, except the pay-roll account. I don't remember exactly the amount of the pay-roll check for July, 1919.

I said that I saw Mr. Daniel driving down the road after the accident. He stopped at our home ranch. It is not a fact that Mrs. McCullough or myself took him back to town on that occasion. The ranch house is about five miles from town, the roads are in fair condition.

I never paid any special, personal attention to the Ford car Fred Davis was driving on that particular day. I had occasion to drive it myself sometimes. We generally tried to keep the brakes in fair shape, as good as possible considering the kind of car it was. I guess probably they were average with any other car. It was an average Ford car. Mr. Daniel was driving an Oakland car the day I saw him. It was not a Pullman car. It was within a week after the accident; I am sure.

On redirect examination by Mr. KEARNEY, Mr. McCullough testified as follows:

Some of the checks in evidence were mailed direct to me and delivered personally in payment for the supply bills; others were mailed direct to the parties themselves. Mrs. Elizabeth A. Rodgers forwarded them to me. She is the only one I sent the bills to at that time. I had frequent conversation over the long distance telephone with Mrs. Rod-

(Testimony of W. R. McCullough.)

gers but I could not give the dates now or say just when.

On cross-examination by Mr. GOODMAN, Mr. McCullough stated:

Check marked Exhibit "A" was not received by me directly from Mrs. Rodgers. I first saw it yesterday. I first saw the other checks exhibited to me here, yesterday. [114]

Thereupon, Mr. FRED DAVIS was called as a witness for the defendant, and after being duly sworn testified as follows:

Testimony of Fred Davis, for Defendant.

My name is Fred Davis. I live in Hazen, Nevada; that during the years 1917, 1918 and 1919, I lived at Winnemucca and Lovelock, Nevada. That prior to 1917, I lived on the Owyhee River. That I first drove the Ford car at the Rodgers Ranch in the latter part of June, 1919. I had been driving cars two or three years prior to that time. I am familiar with the workings of a Ford car and its machinery. I had occasion immediately prior to July 28th, 1919, and subsequent to the time I started to drive the Ford car in June, 1919, to examine the machinery and parts of the car and to make repairs on it. I tightened the bands and the differential so it would work better. The bands that I tightened are the ones that start the car, the brake band and the reverse band. The band on the left-hand side is

(Testimony of Fred Davis.)

the band to start the car on low gear; the one in the middle is the reverse, to make the car go backwards; and the one on the right-hand side is the brake to stop the car with. I tightened them all; also the brake band; afterwards I tried them all and they all worked in good shape. The low band was worn out and did not work very well. It would not take hold. It was so badly worn and would not propel the car fast enough to shift into high gear. The engine would jump and buck if it didn't have the right speed to drop into high and one would have to start in low again; one must travel six miles an hour to go from low gear to high gear. The brakes and differential bands worked fine after I tightened them up; they were not worn. I drove the car on July 28th, 1919, and nearly every day prior thereto, but some days the bookkeeper drove it. I drove it on other days during July and also in June.

The Court thereupon intervened, stating as follows:

The COURT.—Are you proving his competency, Mr. Kearney?

Mr. KEARNEY.—No. This is under his knowledge, showing the condition of the car. I won't offer it for the purpose of showing competency now.

The COURT.—I don't see how that shows the condition of the car; it shows his familiarity with the car. [115]

Continuing, the witness testified:

(Testimony of Fred Davis.)

I drove the car to the town of Lovelock on July 28th, 1919, in the afternoon, entering the city from the west end of 4th Street. I crossed the railroad track and proceeding westerly from there and stopped in front of the First National Bank, a point which I marked with my pencil on Defendant's Exhibit "H." I stopped near the easterly part of the building at the point marked on Defendant's Exhibit "H" with the letter "A." I got out of my car at that point. I went to the postoffice just west of the First National Bank Building, next to the corner marked "Cash Grocery," indicated on Exhibit "H" by the letter "B." I went directly back to the car from the postoffice. There was a pile of sand in the street in front of the First National Bank Building; also a large pile of lumber used for remodeling the First National Bank Building. My car was parked on the east side of that pile of sand which is marked with the circle on Exhibit "H." The sand extended 10 or 15 feet out into the street, or about one-third the distance across the 60-foot street. On coming back to my car, I saw Mr. Daniel, the plaintiff, as he stepped off the sidewalk in front of the Mascot bar on the opposite side of the street, which is indicated on Plaintiff's Exhibit "H," almost opposite the First National Bank Building, which is marked with the letter "C." Mr. Daniel was going toward the postoffice from "C" toward "B" on Plaintiff's Exhibit "H." After seeing Mr. Daniel step from the sidewalk, I cranked the car, got in and backed

(Testimony of Fred Davis.)

the car so I could go around the sand pile and turn into the street. I was travelling westerly in the direction toward the postoffice, which is approximately 100 feet from where I got into the car. The low band on the car was worn and would not take hold, and I had to go quite a distance before I could get into high gear. I must travel six miles per hour before I could pick up on high gear without killing the engine. I saw Mr. Daniels probably 40 feet ahead of me in the middle of the street. I then sounded my horn. Mr. Daniel was travelling toward the postoffice. He was 30 or 40 feet in front of me when I sounded the horn, and I was about one-half way between the curb and the middle of the street, and as I got up about a step or [116] two away from him, he turned around and stepped back and grabbed hold of the fender and he was knocked down and the front wheel passed over his right leg. He was out of my line of travel before he stepped back. If he had stood still, my car would not have struck him. He was not running at any time across the street, but was walking. His handprints were left in the dust on the fender, and I also saw him take hold of the fender. The front wheel on the right-hand side of the car passed over his leg. I had just dropped into high gear and was driving not over ten miles an hour. I cannot tell how many feet I had travelled after I had speed enough to drop into high gear, but probably 20 feet. I had difficulty in dropping into high gear. The engine bucked and jerked as there was

(Testimony of Fred Davis.)

not enough speed to hold the engine in high. I stopped the car in half its length after Mr. Daniels was struck. When I stopped, he was between the front and hind wheel and picked himself up. He then walked across the street to the postoffice. I turned the car to the left away from him that took the car off his leg. He was between the front and the hind wheel when he arose and went into the postoffice. I got out of the car and followed him and caught up with him in the postoffice door. I laid my hand on his shoulder and asked him if he was very badly hurt. He said no, and the rest I could not catch; but probably swore; he was very mad. My car was right opposite the postoffice when I stopped and got out of it and left it standing when I went after him to ask him if he was hurt. The car was about 30 feet from the sidewalk line. The front wheels were probably in the middle of the street, and the hind wheels closer to the postoffice. The marked "D" on the map, Plaintiff's Exhibit "H," shows the position where the car was stopped. There were other cars on the street at that time; one was moving and two were parked right opposite the bank across from the postoffice building in front of the Mercantile Bank. Mr. Daniel jerked away from me and swore when I met him in the postoffice. I then went back to my car and drove off.

On cross-examination by Mr. GOODMAN, Mr. Fred Davis testified:

I was sixteen years old on the 16th of May this

(Testimony of Fred Davis.)

year. I adjusted and fixed up the differential on the car. The differential [117] is where the gears are situated, the gears that start and control the car, up near the back of the engine under the driver's feet; situated very near the middle of the car, in fact they are in the middle of the car and control the starting and stopping and speed of the car. The differential is the only part of the car which I repaired. Other parts needed repairing. It was not difficult to stop the car, but was difficult to start it. I stopped behind a pile of sand in front of the First National Bank. The car did not work very good coming up from the ranch. I went in low possibly half the distance between the postoffice and the place where I was parked, the whole distance being probably 100 feet. I went possibly more than 50 feet in low. I remember it was hard to start in low and I remember I had to go sometimes a long distance in low to get it started fast enough. I was not looking at the building to measure the distance. In an ordinary Ford car in good working condition, you can start out in low and at 10 feet drop into high; that Ford was in very bad working condition and it naturally would take quite a distance; and I remember I have started out at the Big Fifteen Ranch and from the house to the gate is probably 200 feet, and I have sometimes gone over half way to that gate before I could drop into high. My assumption on the distance I travelled in low in starting that day is an estimate. The car needed a general overhauling.

(Testimony of Fred Davis.)

The best that the car could make was 25 or 30 miles an hour. I never went that fast in the streets of Lovelock, but tested it out on the road to town and to the Tule Ranch. I had no speedometer on the car that day. I was travelling not to exceed 10 miles an hour when Mr. Daniels was struck. I know that there is no Ford like that that will make that speed in that distance, and you cannot go that speed in low with that Ford. I saw Mr. Daniels leave the sidewalk in front of the Mascot Bar. I did not see Mr. Daniels during all of the time between the time he left the sidewalk and the time that he was struck. I did see him just before the collision when he crossed in front of me. At the time Mr. Daniel was 40 feet from me, he was right in front of me. I thought he was going to be passed and out of my way and there was no danger. I sounded my horn, as it is the usual thing when anybody is in front of me. I was coming westerly with [118] my car and Mr. Daniels was out of the way, and he stepped back and grabbed the light and the fender. He was entirely in the clear at that time. When he fell, his feet would be a little under the car and the rest of his body in the clear. That is as far as my knowledge is of it. I observed it that way. Mr. Daniels was probably five feet from the curb before he stepped back. He stepped back two or three feet. It may have been one step and may have been two steps. It was probably two, for he had to turn and take one step. If he had gone on, he would have been

(Testimony of Fred Davis.)

struck. The front wheel ran on to his toe and the car passed over a part of his leg. I had a conversation with Mr. P. H. Wolf immediately afterwards in front of the postoffice while the car remained where it was stopped as shown on the defendant's map Exhibit "H." I have recently discussed the incident and have always related the circumstances exactly as I have here as far as I could. I remember discussing the matter in Mr. Goodman's office, and estimated at that time that I was travelling under 12 miles an hour. I described it to you in your office as I did to anybody else. I may have left out a few little points, but the whole thing is the same. I had brought some laundry from the ranch to be laundered. After the accident, I delivered the laundry. It was in the front seat in one of those laundry bags about one-third full. It was small. It did not interfere in any way with the operation of the car. I used the emergency brake in stopping at the time of the accident. I was not in the car at the time I saw Mr. Daniel leave the sidewalk at the Mascot. I got into the car immediately afterwards. It might have been a couple of minutes or less. I was in the car driving when I saw him again. My car moved only half its length after the accident. I have never measured the length of a Ford car. Mr. Daniel's handprints were left on the car in the dust. I brought no men to town from the ranch that day. I tested the car out when I had a good stretch to run it. The condition of the engine and

(Testimony of Fred Davis.)

the differential determine how fast it would go. With the differential fixed up, it would go better but not faster. The roads from the ranch to Lovelock were not very good after they put gravel on. The roads in town were very bad. You [119] cannot go slow on it without getting your neck jolted. I never ran fast in town.

On redirect examination, Mr. Davis testified as follows:

While I was working for the Western Union, Mr. Goodman asked me to come to his office.

On recross-examination, the witness testified:

I do not remember how long that was after the accident.

Testimony of Mrs. Warren B. Flick, for Defendant.

Mrs. WARREN B. FLICK was thereupon called as a witness for the defendant, and after being duly sworn, testified as follows:

My name is Mrs. Warren B. Flick. I live in Lovelock. I am acquainted with the plaintiff, Mr. J. B. Daniel. I knew him in July, 1919. I saw him on or about the 29th day of July, 1919. I recall having heard of an accident that was supposed to have happened to Mr. Daniel. I saw him shortly after the accident. As near as I can remember, it was the next evening at his home. He was out in his garden. Sometime later than that, I went to the theater and sat by Mr. and Mrs. Daniel. My niece, Mrs. R. H. Beale was with me.

(Testimony of Mrs. Warren B. Flick.)

I remember the night we were in the theater that Mrs. Daniels told me they were going to Lake Tahoe shortly after that. I sat by Mr. Daniel. He was on the other side of Mrs. Daniel. Mr. Daniel was on one side; next sat Mrs. Daniel; next myself, and my niece on the other side of me. Mrs. Beale was introduced to Mr. Daniel that night across me. She was sitting on one side of me and Mrs. Daniel was sitting on the other side of me, and Mr. Daniel on the opposite side of Mrs. Daniel. That was sometime before they took their trip to Lake Tahoe.

On cross-examination, Mrs. Flick testified as follows:

I saw Mr. Daniel in his garden; just observed him; I said nothing to him. The garden is a small little garden, a few beds of flowers or something growing there. We were in the yard and he was standing over in his garden. Mr. Daniels was on one end of the four, and my niece was on the other end, while we were in the theater. [120]

Thereupon, Mrs. CORA F. DARRAH was called as a witness on behalf of defendant, and having been previously sworn, testified as follows:

Testimony of Mrs. Cora F. Darrah, for Defendant.

Mrs. DARRAH.—My name is Cora F. Darrah. I am the mother of Fred Davis. I am acquainted with the plaintiff, J. B. Daniel. I have known him by sight since the early part of 1919. I was employed at Lovelock by the Utah-Nevada & Idaho

(Testimony of Mrs. Cora F. Darrah.)

Telephone Company as district manager and chief operator, and was so employed on July 28th, 1919. I saw my son on the afternoon of that day driving into town around 3 o'clock. I saw him on the street before he came to the telephone office, not to speak to him. I just saw him coming into town. I saw him back his car in front of the telephone office toward the right of the building. The telephone building, or rather the First National Bank Building, was being remodeled and there were various piles of building material in front of the office, with the exception of immediately in front of the stairway, which was to the right of the building. It was in front of that he parked his car. I didn't see Mr. Daniel that day. I saw him the following day at his home in the living-room. He was standing when I first saw him, but he sat on the divan or settee and later got up and walked across the room while I was there. Mr. Goodman was there when I first went in. I had a short conversation with Mr. Daniel about the accident. I saw Mr. Daniel again three or four days later in his car in front of the telephone office as he was driving by. There were other people in the car with him. I had occasion to ascertain that Mr. Daniel's hearing was not good. He called in from the Big Five Ranch and I repeated a few words of his conversation. It was out to Fanning station, and once he called from the telephone office to this same station, and I noticed that he repeated, or that he asked to have the conversation repeated a time or two from

(Testimony of Mrs. Cora F. Darrah.)

the party he was speaking to. He was talking from a wall telephone right next to the switch board so I was able to hear what he said.

On cross-examination, Mrs. Darrah testified as follows:

Mrs. DARRAH.—I have been district manager of the U. N. I. T. [121] Co. nine months. I found the equipment of the company first class, as good as any in the state, barring the transcontinental line of the Bell Telephone Company. I concluded that he had not heard what was said from his request to have the conversation repeated. At the particular time of the conversation, the line was in good condition. I went to visit Mr. Daniel about the accident and had a conversation with him concerning it. I had not talked to my son about it up to that time. I didn't call on Mr. Daniel at any other time in Lovelock. I saw him frequently on the street after that. I do not remember of ever having seen you, Mr. Goodman, with Mr. Daniel, excepting at his home. I have very fine hearing. I have frequently asked people to repeat messages over the telephone.

Thereupon the deposition of Miss HAZEL ZUNINI was called for by Mr. Kearney on behalf of defendant. The deposition was taken under stipulation dated April 24th, 1920, and was offered in evidence on behalf of defendant. It was stipulated by counsel for plaintiff and defendant that the second question should be read: "Do you know the plaintiff"? The deposition was then read by

(Testimony of Mrs. Cora F. Darrah.)

counsel for the defendant. Thereupon, the following took place:

Mr. SPRINGMEYER.—We offer in evidence the deposition of Millie L. Rodgers, and after that we will offer the deposition of Elizabeth A. Rodgers.

Mr. GOODMAN.—I have no objection. There may be objections to the responses to the questions. I have never seen the depositions or the answers.

The COURT.—Were your objections noted in the deposition itself?

Mr. GOODMAN.—No, your Honor. The stipulation provides that said depositions when taken shall be mailed by said Notary to the Clerk of the above-entitled court at Carson City, Nevada, and may be read in evidence by either party, subject only to objections as to competency, materiality or relevancy of the testimony set forth therein.

Deposition of Millie L. Rodgers, for Defendant.

Thereupon the deposition of MILLIE L. RODGERS was read by Mr. Springmeyer. The deposition in full is as follows: [122]

In the District Court of the United States in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Interrogatories Propounded to Millie L. Rodgers.

Interrogatories to be propounded to MILLIE L. RODGERS, defendant in the action entitled above, residing in San Francisco, California:

FIRST INTERROGATORY.

Give your name and place of residence.

SECOND INTERROGATORY.

Are you the defendant in the action entitled above?

THIRD INTERROGATORY.

Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, State of Nevada, known and described as the Reservation or Rodgers ranches and of a Ford automobile used in connection with the operation of said properties?

FOURTH INTERROGATORY.

Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory?

FIFTH INTERROGATORY.

If your answer to the fourth interrogatory is in the negative please state if you know who during the month of July, 1919, was in the possession, management or control of said ranches and automobile?

SIXTH INTERROGATORY.

If your answer to the fifth interrogatory is that the said ranches and automobile were in the possession and under the management or control of your

mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control. [123]

SEVENTH INTERROGATORY.

If your answer to the sixth interrogatory is that your mother Elizabeth A. Rodgers, was in the possession and had the management and control of said ranches and automobile, under an oral lease and agreement, please state what the terms of said oral lease and agreement were.

EIGHTH INTERROGATORY.

Who, if you know, received the profits, if any, arising from the operation of said ranches during the month of July, 1919?

NINTH INTERROGATORY.

Who, if you know, paid the operating expenses of said Reservation for Rodgers ranches for the month of July, 1919?

TENTH INTERROGATORY.

Who, if you know, paid for supplies used in the operation of said ranches and automobile during the month of July, 1919?

ELEVENTH INTERROGATORY.

Who, if you know, was in active charge of said ranches during the month of July, 1919, as the superintendent thereof?

TWELFTH INTERROGATORY.

If you know, please state who employed and paid such superintendent?

THIRTEENTH INTERROGATORY.

Have you at any time since the said ranches and

automobile came into your ownership exercised any control or management of the same either directly or through any person or persons acting as your employee or employees, agent or agents or representative or representatives?

W. M. KEARNEY,
CANTWELL & SPRINGMEYER,
Attorneys for Defendant.

**Answers to Interrogatories Propounded to Millie
L. Rogers, for Defendant.**

The following answers to the above interrogatories submitted to Millie L. Evans were given.

FIRST INTERROGATORY.

Millie L. Rodgers, corner Market and New Montgomery Streets, San Francisco, California. [124]

SECOND INTERROGATORY.

Yes.

THIRD INTERROGATORY.

Yes.

FOURTH INTERROGATORY.

No.

FIFTH INTERROGATORY.

Elizabeth A. Rodgers, my mother.

SIXTH INTERROGATORY.

Under an oral lease.

SEVENTH INTERROGATORY.

My mother leased the property from me under an agreement to operate it and pay me one-half of the annual net profits therefor.

EIGHTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

NINTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

TENTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

ELEVENTH INTERROGATORY.

W. R. McCulloch.

TWELFTH INTERROGATORY.

My mother, Elizabeth A. Rodgers.

THIRTEENTH INTERROGATORY.

Yes.

MILLIE L. RODGERS,

MILLIE R. EVANS.

Cross-Interrogatories to be propounded to Millie L.
Rodgers, the Defendant:

FIRST CROSS-INTERROGATORY.

How old are you?

SECOND CROSS-INTERROGATORY.

In what manner are you related to Mrs. Elizabeth
A. Rodgers?

THIRD CROSS-INTERROGATORY.

By whom was the Rodgers or Reservation Ranches
deeded or transferred [125] to you, and if you
did not obtain title by deed state how you acquired
title.

FOURTH CROSS-INTERROGATORY.

If you have testified that your property in Love-
lock Valley was in the year of 1919 under an oral
lease to your mother, please give the date, and place
where the lease agreement was entered into.

FIFTH CROSS-INTERROGATORY.

Did the agreement of lease include all the per-

sonal property on your ranches, and if it did not state how much it did include?

SIXTH CROSS-INTERROGATORY.

Did the lease include all of your ten thousand acres of land in Pershing County, Nevada, and if it did not include all state what part or parts it did include.

SEVENTH CROSS-INTERROGATORY.

For how many years did you make the lease?

EIGHTH CROSS-INTERROGATORY.

Have you ever managed your ranches in Lovelock Valley yourself?

NINTH CROSS-INTERROGATORY.

What if anything did your mother Mrs. Elizabeth A. Rodgers do in relation to the management of your ranches in the years of 1916, 1917, and 1918 or any one of those years?

TENTH CROSS-INTERROGATORY.

At the time of making the agreement or lease with your mother Mrs. Rodgers, state fully just what was said by each of you, and what witnesses, if any, were present?

ELEVENTH CROSS-INTERROGATORY.

What portion of the profits from your ranch operations in Lovelock Valley are shown in your income tax return for the year of 1919?

TWELFTH CROSS-INTERROGATORY.

On the 6th day of December, 1919, when you verified your answer to the original complaint in this action, were the matters you have testified to known to you?

THIRTEENTH CROSS – INTERROGATORY.

If your answer to the last cross-interrogatory was in the affirmative then state why you admitted under oath that Fred Davis was your servant, [126] in your employ, and operating the automobile in question under your direction and control in the course of his employment?

FOURTEENTH CROSS – INTERROGATORY.

Had you communicated all the matters contained in your answers to your attorneys at the time your first answer was filed?

FIFTEENTH CROSS-INTERROGATORY.

Isn't it a fact that the agreement with Mrs. Rodgers was in substance, that she would manage and take care of your property for a consideration of one-half the profits?

SIXTEENTH CROSS-INTERROGATORY.

State fully the extent of your personal experience in managing ranches, either your ranches in Lovelock Valley, or other ranches.

SEVENTEENTH CROSS-INTERROGATORY.

Have you had any other ranch properties other than the ones in question, and if so are they under lease to your mother?

EIGHTEENTH CROSS – INTERROGATORY.

You reside with your mother Mrs. Elizabeth A. Rodgers, do you not?

NINETEENTH CROSS – INTERROGATORY.

What is your San Francisco address?

TWENTIETH CROSS-INTERROGATORY.

Do you maintain, or have you ever maintained a business office, and if so when and where?

TWENTY-FIRST CROSS-INTERROGATORY.

Are you acquainted with the plaintiff in this action?

TWENTY-SECOND CROSS-INTERROGATORY.

Did you fail to mention the lease to your mother in your original answer by reason of any desire to conceal the same until such time as an action against your mother would be barred by reason of the statute of limitations fixing the time in which actions must be brought for damages arising from personal injuries?

TWENTY-THIRD CROSS-INTERROGATORY.

The properties which you claim and allege to be under lease to Elizabeth A. Rodgers, or which were under lease in July, 1919, are of the value of more than one million dollars, are they not? [127]

TWENTY-FOURTH CROSS-INTERROGATORY.

Approximately how many times were you in Lovelock or on your ranches while they were so under lease, or since they were leased if the lease is still in force?

TWENTY-FIFTH CROSS-INTERROGATORY.

Who represents or acts for you in making sales of produce or personal property from your ranches in Lovelock Valley?

TWENTY-SIXTH CROSS-INTERROGATORY.

Who acted for you in the year 1919 in the sale of fertilizer to E. A. Parkford of Los Angeles?

TWENTY-SEVENTH CROSS-INTERROGATORY.

It is a fact that your mother Mrs. Elizabeth A. Rodgers keeps all your business accounts for you, and is your adviser in all business matters?

BOOTH B. GOODMAN,
ROBERT RICHARDS,
Attorneys for Plaintiff.

Answers of MILLIE L. RODGERS to Cross-Interrogatories.

FIRST CROSS-INTERROGATORY.

Twenty-five years.

SECOND CROSS-INTERROGATORY.

I am her daughter.

THIRD CROSS-INTERROGATORY.

By deed from my mother, and from the estate of my father.

FOURTH CROSS-INTERROGATORY.

The agreement was made at San Francisco, California, in the month of March, 1919.

FIFTH CROSS-INTERROGATORY.

It included everything with the exception of some marketable products then on the ranch, such as some hay, grain and fertilizer.

SIXTH CROSS-INTERROGATORY.

Yes.

SEVENTH CROSS-INTERROGATORY.

It was to be from year to year during my mother's lifetime, unless we both decided to drop it. [128]

EIGHTH CROSS-INTERROGATORY.

No.

NINTH CROSS-INTERROGATORY.

Nothing, except to give me her views on any matter that I asked her, or do anything that I asked her to do, as a parent would, naturally.

TENTH CROSS-INTERROGATORY.

I cannot recall the exact conversation now. Many things were said back and forth about the ranch from time to time covering a considerable period, until my mother finally stated that she would lease the property and operate it herself, and give me one-half of the net profits, to which I agreed. Miss Diggs, I believe, was present when the matter was finally decided upon, or at least during much of the discussion.

ELEVENTH CROSS-INTERROGATORY.

One-half.

TWELFTH CROSS-INTERROGATORY.

Yes.

THIRTEENTH CROSS-INTERROGATORY.

I did not understand that I was admitting anything except the ownership of the ranch when I read the answer. Later, through discussion with my attorney, John E. Bennett, the error was discovered, he not fully understanding the situation at that time.

FOURTEENTH CROSS-INTERROGATORY.

No, I answered at the time what questions my attorney asked; but he did not ask me if Davis was my servant, in my employ, and operating the automobile under my direction and control in the course of his employment. My attention was not called to this particular feature when I read the answer.

I naturally signed the paper which the attorney presented to me which I thought covered the ownership of the ranch, as he knew of the deeds to me.

FIFTEENTH CROSS-INTERROGATORY.

No.

SIXTEENTH CROSS-INTERROGATORY.

I have no experience as such manager

SEVENTEENTH CROSS-INTERROGATORY.

No. [129]

EIGHTEENTH CROSS - INTERROGATORY.

Yes.

NINETEENTH CROSS - INTERROGATORY.

Corner Market and New Montgomery Streets.

TWENTIETH CROSS-INTERROGATORY.

No.

TWENTY-FIRST CROSS-INTERROGATORY.

No.

TWENTY-SECOND CROSS-INTERROGATORY.

No, I know nothing about the statute of limitations.

TWENTY-THIRD CROSS-INTERROGATORY.

I have never had them appraised nor fixed a value for them.

TWENTY-FOURTH CROSS-INTERROGATORY.

Once, I believe.

TWENTY-FIFTH CROSS-INTERROGATORY.

No one. The ranch is leased.

TWENTY-SIXTH CROSS-INTERROGATORY.

I do not remember when this fertilizer was sold; but if it was sold after March, 1919 it was probably

sold by my mother as part of the salable products reserved from the lease. If sold prior to that time it was sold by the ranch superintendent.

TWENTY-SEVENTH CROSS-INTERROGATORY.

No.

MILLIE L. RODGERS,
MILLIE R. EVANS.

No objections were raised by plaintiff's attorney until the reading of the Fourth Interrogatory:

Fourth Interrogatory: Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory?

A. No.

Mr. GOODMAN.—That is objected to as a conclusion.

(Discussion.)

The COURT.—I think that called for a conclusion. The question did in the first place; and certainly the answer is a conclusion.

Mr. SPRINGMEYER.—We will take an exception to the ruling of the Court on the ground the question is proper. [130]

The COURT.—On the ground that the question is proper?

Mr. SPRINGMEYER.—Yes, may it please the Court.

The COURT.—Very well, if you put it on that ground I have no hesitation at all.

Mr. SPRINGMEYER.—And that it is material to the issues raised in the case.

The COURT.—It is a mere conclusion. You may go on. I think the particular instruction to the jury will be that they are to determine that fact from the evidence and not from any conclusion as to law or fact that is given by a witness. That is the very question for them to determine after they have considered the testimony; and it is a conclusion which should be determined from the evidence that is offered.

Mr. SPRINGMEYER.—(Reading:) Fifth Interrogatory. If your answer to the fourth interrogatory is in the negative, please state, if you know, who during the month of July, 1919 was in the possession, management or control of said ranches and automobile.

The COURT:—That is the same thing, Mr. Springmeyer, and the same exception.

Mr. SPRINGMEYER.—(Reading:) If your answer to the fifth interrogatory is that the said ranches and automobile were in your possession and under the management or control of your mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control.

Mr. GOODMAN.—We make the same objection to the question.

The COURT.—I will let that stand now.

Mr. SPRINGMEYER.—(Reading:) A. Under an oral lease.

Mr. GOODMAN.—I renew my objection to the answer. What constitutes a lease, either oral or

written, is purely a question of law, and not a question of fact.

The COURT.—That depends on whether they have set out the lease or not.

Mr. SPRINGMEYER.—(Reading:) If your answer to the sixth interrogatory is that your mother, Elizabeth A. Rodgers was in the [131] possession and had the management and control of said ranches and automobile under an oral lease and agreement, please state what the terms of said oral lease and agreement were.

A. My mother leased the property from me under an agreement to operate it and pay me one-half the actual net profits therefor.

Mr. GOODMAN.—The same objection to that question on the ground the statement of the person leasing the property is really a conclusion of law.

The COURT.—Well, gentlemen, it is four o'clock and I think you had better look that deposition over and be ready in the morning to state your objections before the answers are read. I will hear your objections in the morning and after they are disposed of, the rest of the deposition may be read to the jury.

Upon reconvening on Saturday, June 4th, at 9 o'clock A. M., the following proceedings were had:

Mr. KEARNEY.—Instead of continuing with the deposition at this time, I would like to put Dr. Maclean on the stand.

Testimony of Dr. Donald Maclean, for Defendant.

Thereupon, Dr. DONALD MACLEAN was called as a witness by defendant, and after being duly sworn, testified as follows:

Dr. MACLEAN.—My name is Donald Maclean. I am practicing physician and surgeon and have so practiced for 23 years. I received my education in Edinburgh, Scotland. I took a post graduate course in Vienna and a post graduate course at the University of London; also a post graduate course in New York and a six weeks' course at the Mayo clinic in Minnesota. My practical experience in my profession constitutes service in the U. S. Army during the Spanish-American War in charge of the surgical department in the general hospital at Savannah, Georgia; in charge of the surgical ward at the Presidio General Hospital, San Francisco; chief of staff of St. Vincent Hospital, Leadville, Colorado, for several years. I have been chief medical adviser for the Nevada Industrial Commission for eight years and in general practice ever since graduation continuously for 23 years. I have performed surgical operations as well as practicing as a physician. I have had a great deal of experience in examination of X-ray plates, particularly in diagnosing cases for surgical [132] operations and bone injuries. During the last eight years as chief medical adviser for the Nevada Industrial Commission, we have had between six and seven thousand claims, a certain percentage being bone cases which

(Testimony of Dr. Donald Maclean.)

require X-ray plates submitted for our review. I have studied several hundred X-ray cases at least, for the Commission. In other cases in the performance of surgical operations, I have examined X-ray plates. I have checked up my examinations with actual operation on the patients subsequently. I have found that I have been correct in reading the X-ray plates from subsequent operations. A practicing surgeon does not rely on X-ray plates. He relies on his physical findings and merely uses X-ray plates to check up. Physical science of a fracture or injury to a bone is usually very very definite, and it is only in those cases in which there is any doubt that a man relies on the X-ray plates. An X-ray plate can be made to show, well, almost anything, depending upon the angle at which the picture is taken. An X-ray plate represents a shadow on the bone. It is not an actual picture such as is taken in ordinary photography. It is a shadow—a picture of a shadow. The X-ray does not penetrate bone, but penetrates the soft tissue. The plate is placed behind, and the light is transmitted through, and the consequence is, the plate shows nothing but the shadow of the bone. In other words, the bony portion is not shown upon the plate. The distance of the bone from the plate and the distance of the ray from the bone make a vast difference as to the definiteness with which the shadow is shown. I do not think I looked at any of the pictures in evidence here, only the films. The pictures of a plate are not ever very definite.

(Testimony of Dr. Donald Maclean.)

I examined Plaintiff's Exhibit No. 5. It represents the hip joint, a small portion of the shaft of the femur. I made a careful examination of it. I cannot find any thing wrong with it. It seems to be a perfectly normal hip joint and pelvic bone, as far as shown. I examined it with reference to the lower border of the pubis. The descending ramus shows a slight roughening. That does not indicate anything very much. You might find that in a picture of the descending ramus of the pubis or the pelvic bone of almost any man past middle life. It represents nothing out of the ordinary in a man past [133] seventy years. I would say it represented a perfectly normal condition and will cause no inconvenience of a man of seventy-three years of age or any other person. I examined plaintiff's Exhibit No. 7 and 8. They represent the same thing as number 6 on the other side. There are no irregularities whatever, and nothing abnormal is shown on them. It represents a perfectly normal hip joint in my opinion, after a very careful examination. I examined plaintiff's Exhibit No. 9. It represents a picture of the lower dorsal lumbar spine and the pelvic bones at the junction,—at the back junction with the spine. I cannot see anything abnormal among the vertebrae in this picture. I would like to say in regard to that that it is the opinion of X-ray experts and industrial commission surgeons throughout the country, that thorough definite pictures of the lumbar spine cannot be taken; the lower lumbar spine in ninety per cent

(Testimony of Dr. Donald Maclean.)

of all men are not the same. They do not agree. they are an anomaly in nearly all men in the lower lumbar spine; and to get a picture of it in the position in which it lies, is almost impossible; a definite picture, but as near as you can see from that picture, the lumbar spine is normal. It appears to be a normal lumbar spine, but it would appear that when the picture had been taken, the light had been transmitted a little to one side. The spinous processes should lie square in the middle, and these are a little to the right, the light being transmitted through the bodies of the vertebrae and the spinous processes. The fact that the spinous processes show a little to one side, instead of exactly in the middle of the column, would lead one to think that the X-ray tube, the center of the X-ray tube, has been slightly to the left, transmitting indirectly, rather than directly through the body of the vertebrae. This would produce the representation that is shown upon that film. There is always a lateral curvature in every normal man who reaches adult life. In the right hand man, the curvature is to the right, the vertebrae lean to the right in the muscular play, and in the left handed man, the upper dorsal vertebrae lean to the left; and in order to balance that, there is always lower down a slight curvature in the lower part of the spine; there is a big curvature in your spine backwards in order [134] to make space for the heart, lungs and abdominal organs. There is a big curvature backward like that, the cavity being forward. That is balanced lower

(Testimony of Dr. Donald Maclean.)

down by convexity. The spine curves the other way so as to maintain the correct position, and in the man who reaches the adult life, there is always a certain amount of lateral curvature by reason of the muscular pull. A man who did not stand erect would unaccountably after a length of time have a lateral curvature. Any tailor will tell you that no man has equally well balanced shoulders; that one shoulder is always lower than the other; that eventually causes a curvature of the spine. A lateral curvature due to lowering of the shoulder would take years to develop. It would not develop in a few months. It keeps on getting worse and worse. I examined Plaintiff's Exhibit No. 15, an X-ray film plate. It represents the upper dorsal of the cervical vertebrae. The only abnormality is a slight exostosis, a bony outgrowth in the cervical vertebrae. It is a slight deposit of bone rather than an overgrowth. It is a condition in most people past middle life. It used to be an idea that nature for some reason or other drew calcereous matter out of the bone and deposited it where it wasn't wanted; and where we have joints in close opposition, the joints are apt to have a bony deposit thrown out there. It might be due to disease and might be due to infection. It is not abnormal in a man over seventy years of age. In my opinion, you find it in every man past middle life. I find a slight separation of the first rib on the right side in the upper part of the body. It is a very slight separation. I don't think it is a serious matter. It might give

(Testimony of Dr. Donald Maclean.)

him some neuralgic pains and at times some irritation. I am inclined to think it is of long standing, for the reason the rib end is much smaller than is usually seen. That separation could quite easily come from the habit of dropping one's shoulder. A muscular condition could produce it very readily. I examined Plaintiff's Exhibit No. 11, an X-ray plate. That represents the first lumbar and the lower dorsal vertebrae. It shows nothing abnormal. I examined Plaintiff's Exhibit No 17. It represents the right shoulder joint. It is a very normal shoulder [135] joint, particularly of a man over seventy years. There is no abnormal bony deposit there, unless one could say that perhaps that little point which is really a coranoid process of the scapula, which seems to be bigger than it should be. There is absolutely nothing that would cause uneasiness or physical debility of any kind. I made an examination of all the plates prior to the present time. I examined Plaintiff's Exhibit No. 19. It is a lateral view of the cervical or neck vertebrae and the base of the skull and jaw, upper cervical vertebrae. I cannot see anything abnormal or out of the way with it. There is not anything that would cause limitation of the movement of the head shown in it. There is no exostosis shown in that picture, unless it may be a slight increase in the spinous processes of the second or axis vertebrae. You would expect a certain amount of thickening, such as that in a man seventy years of age. It is natural in all men past fifty years of age. Exosto-

(Testimony of Dr. Donald Maclean.)

sis is almost entirely joined tissue; that is why old people have stiff joints. It is a natural condition. That picture shows absolutely nothing abnormal in a man over the age of seventy years. In a person over sixty years of age, the bones become more brittle, and they usually become somewhat smaller. They atrophy. The joints at the end become thickened, somewhat enlarged by the deposit of the tissue which eventually becomes bone. In taking an X-ray picture, a slight movement of the body makes a very great difference in the shadow that is produced. If the body is slightly twisted, an X-ray picture will not produce the same picture as if the body were not twisted. The trapezius muscle has no connection with the lower vertebrae of the spine. From my examination of the X-ray pictures and plates, I found nothing that would lead to atrophy of the trapezius muscle. Atrophy of a muscle is either due to its being turned from its base and its blood supply cut off, or injury to its nerve. It is not supplied by the spinal nerve, but by the spinal accessory nerve. An injury to the trapezius muscle would not necessarily cause a curvature of the spine. In carrying your body with a low shoulder, a curvature would be produced undoubtedly. If the trapezius muscle from any reason was injured or atrophied to allow the shoulder girdle to drop, it would be [136] very natural to pull the spinal cord to that side a little bit.

(Testimony of Dr. Donald Maclean.)

Thereupon Dr. Donald Maclean testified on cross-examination by Mr. GOODMAN, as follows:

I have not read Rose's work on surgery, I have heard of it. I do not make a specialty of radiology. My experience with radiology has been largely as the chief medical adviser for the Industrial Commission for eight years. We take the pictures and have them taken. We have an X-ray machine available here at Carson City. In taking pictures we place the patient on the table in a natural position, placing the ray directly over the bone and when a picture is taken that way it is usually reliable provided your plates are not defective and your machine is correct. I would consider a picture of that kind, correctly taken, a reliable photograph. I would not consider it more reliable than a physical diagnosis. Its reliability as to the bone condition depends a great deal upon what the bone condition is you are trying to find. Frequently you can take a picture with an X-ray of a broken bone, fractured clear through, and it will not show the fracture, depending upon the angle of the fracture. That is the reason X-ray fractures are taken always at two or three angles if possible because one angle will not show what you want to get. There may be a fracture and if the two parts overlap, you cannot detect it. It is usually necessary to make a physical examination of a patient to properly interpret X-ray pictures. I would as a physician and surgeon not merely take X-ray plates but use a physical examination. The

(Testimony of Dr. Donald Maclean.)

physical condition of men of the same age undoubtedly differs very greatly. Some men at forty are older than other men of seventy. In answering my questions as to a man over the age of seventy years I am assuming the average man. The average man does not live more than fifty-eight years, I believe. A man seventy years is undoubtedly pretty well debilitated anyway. You will not find abnormal conditions in all men of that age. Those conditions I mentioned may exist in a man of that age from natural causes, not that they exist in every instance. I do not want you to understand that they could not be produced by injury even though he [137] were over seventy years of age, some of these conditions could be produced by injury.

The roughening of the bones on the descending ramus of the pubis is perceptible in both pictures but more in the left. The roughening of the bone I think could be caused also from an injury if it was not caused from ordinary natural causes and when I say it is normal I am assuming it was not caused by injury but it may also have been from natural causes.

If a man's pelvis is tilted from injury, assuming that it is, and a correct picture is taken, you may get the same condition in that position which would be indicated by this picture unquestionably. The difference in those two pictures was either due to tilting of his pelvis as he lay on the table or due to

(Testimony of Dr. Donald Maclean.)

the angle the ray was placed, one or the other, and from the pictures the expert cannot tell which.

An X-ray picture is, as you have said, a shadow picture which I think makes it a little less reliable than any other photograph. A photograph of a man's face, or something of that kind, is a very definite impression of it, but this is not an impression of a bone or anything of that kind it is merely a picture shadow; and there are a good many things which make for misreading that thing. There are no other methods of taking an X-ray photograph than the shadow method. The screen method, just looking at them, is far less reliable than the other.

I have examined practically all of these pictures. They represent pretty good X-ray photography and indicate that the man who took them understood X-ray photography. I don't say that the bones of the spinal column look a little to one side. I said the spinous processes look a little to one side. You see the bodies of the vertebrae, the light goes through there (indicating), a space, little dark spaces where the light goes through. Now the light must have gone slightly to one side to go through there. It didn't all show on one side; that is, at an equal black space on each side of the spinous process. [138]

No, I could not say that that spine was out of position because your spinous processes in your body are absolutely in alignment, as far as that is concerned; they come down tick by tick in a straight line; there is nothing there to show the spine was

(Testimony of Dr. Donald Maclean.)

out of position. The spine may be tilted; it may be that he lay a little more on one side than the other, but a curvature would not throw those out of position to that extent, would not throw it to one side. The curvature might show as that shows; a curvature comes from here down that way (showing); it may be there is a slight curvature, that would be if this were thrown over to that side.

I would not say it is impossible for a violent injury to produce a condition represented there, assuming that picture was correct. It is my opinion that the light was to the right or that he lay more on one side than the other, which is the more natural thing. If he did not lie more on one side and if the light was correct and if the part had received an injury such a result might be reproduced on that plate.

The spinous processes on the right side are not very definite for some reason or other, they are very faint. The transverse process, apparently of the second lumbar, is not quite in the right position. That would not ordinarily be caused by natural conditions, but the lumbar vertebrae, as I explained to Mr. Kearney in direct examination are the hardest vertebrae in the world to take a correct picture of, and the angle at which the light goes through would be very apt to show that in that position. The transverse process is decidedly bent up. It might be possible that the process has been broken off and thrown upward. That might easily represent a fracture. It would not require a very vio-

(Testimony of Dr. Donald Maclean.)

lent blow to produce it; it depends a good deal upon the subject. It is not necessary to have a violent blow to break all the transverse processes in some people. All those films are above the average. I don't see any evidence of a fracture after again examining Exhibits 5 and 7. I don't see any evidence of a fracture in either of them. An expert cannot determine atrophy of a muscle from X-ray plates. A physical examination is necessary to determine that. X-rays penetrate a bone to a certain [139] extent. Some rays even penetrate two inches of aluminum. An injury to the shoulder destroying the circulation to the trapezius muscle might cause a drop of the shoulder. If it destroyed the circulation, it would dry and just rot away if the circulation were destroyed entirely. Destruction of the nerve is the usual cause of atrophy, resulting frequently from injury. A drop of the shoulder would not immediately cause a curvature of the spine. It would eventually cause a tilt. I do not know how long it would take, especially in an elderly man. It would take a number of years and would be gradual. The lowering of a shoulder on account of work or handling heavy things constantly over a number of years, is more likely to cause a curvature of the spine than the dropping of the shoulder from the destruction of the muscle. If you had a shoulder out of alignment from any cause, there would be compensatory curves in other parts of the body, or one side would be drawn in a little bit and the hip on that side

(Testimony of Dr. Donald Maclean.)

would be a little more prominent. Also there would be a certain curvature of the spine, probably the head would be carried to this side or might even be carried to the other side. The curvatures vary in individuals. A person may have quite a curvature of the spine and still be a perfectly normal man. A lateral curvature which involves the whole spine would not be as serious as a short displaced curvature. It is not true that normal lateral curvatures involve the whole spine. In usual lateral curvatures of habit, for instance a shoulder curvature, they involve that area to which the muscles of the shoulders are attached, and you usually have lower down, a compensatory curvature the other way. I suppose they are sometimes caused from injuries, but direct injuries, curvatures as a result of direct injuries, are usually indirect compensatory curvatures; that is, exaggeration of the normal curves are the more usual form of curvatures which you see as the result of trauma. Lateral curvatures are not very usually the result of trauma, although they may be if the force come from the right direction. The seriousness of any curvature depends a good deal on the individual and what results from it, rather than what was the cause [140] of it. It would be impossible to state without an examination of the patient what the result of any curvature would be. It is true that the spinal cord may be interfered with by pressure or something else. Pressure will cause atrophy of the nerves. Atrophy of the nerve would cause atrophy of the parts

(Testimony of Dr. Donald Maclean.)

supplied by that nerve. If it control the nerves of the legs or the function of the legs, it might interfere with the patient's ability to walk. Exhibit No. 15 shows a lateral curvature of moderate degree. One must know the history of a case, and make a physical examination to give the effect of a curvature. From an X-ray photograph, an expert could not testify as to the result of a curvature. He might express an opinion as to whether there was anything there to show whether it was due to trauma or not, but he would not be justified in saying definitely. I cannot see where anything that is shown on Exhibit No. 19 should interfere in any way with the movement of the head. I would have to examine the patient. One would be very doubtful. There is so much space between them above and below, apparently there is not enough exostosis or bony outgrowth to interfere in any way with the motion of the head. The spaces are not equal naturally; that is, they are not naturally equal. Any injury to the spinal column usually results seriously.

Thereupon on redirect examination by Mr. SPRINGMEYER, the witness testified:

Dr. MACLEAN.—The condition shown on these plates might result from injury and they might also result from traumatic or diseased conditions or from over exercise of the muscles on one side of the body, such as a right handed man developing a lateral curvature of the spine. Any one of those conditions shown might be due to any one of those

things. Habit, traumatic or diseased conditions or to over exercise of the muscles from one side or the other.

On recross-examination, the witness testified:

Dr. MACLEAN.—My opinion is based upon the X-ray photographs. You could not tell what caused the conditions, but I probably could from X-ray photographs and physical examination and a knowledge of the history of the patient. [141]

Thereupon the deposition of MILLIE L. RODGERS was offered in evidence on behalf of the defendant.

Mr. SPRINGMEYER.—May we now begin at the first interrogatory again without reading the formal parts?

The COURT.—Yes.

Mr. GOODMAN.—The Court desires the objection made to each question?

The COURT.—Yes, I think you had better.

Mr. SPRINGMEYER.—(Reading:) Third Interrogatory. Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, Nevada, known and described as the Reservation or Rodgers Ranches, and of a Ford automobile used in connection with the operation of said properties?

Mr. GOODMAN.—That is objected to as calling for a conclusion and being incompetent as a conclusion of law.

Mr. SPRINGMEYER.—We submit the question

is proper, because while it does call for a conclusion, it is an ultimate fact.

The COURT.—I will sustain the objection.

Mr. SPRINGMEYER.—We take an exception on the ground the question is proper as calling for a fact. (Reading:) Fourth Interrogatory. Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory?

Mr. GOODMAN.—Same objection, your Honor, on the ground that possession of the land and control are conclusions only, and that the question calls for a conclusion, a legal conclusion.

The COURT.—Well, it was a leading question. I think it is objectionable.

Mr. SPRINGMEYER.—We except on the same grounds. (Reads:) Fifth Interrogatory. If your answer to the fourth interrogatory is in the negative, please state, if you know, who during the month of July, 1919, was in possession, management or control of said ranches and automobile?

Mr. GOODMAN.—Exactly the same objection there. The question is even more objectionable and the same objection would apply. It [142] is a conclusion as to who was in possession, management and control; three legal conclusions embraced in that question.

The COURT.—The same ruling and exception.

Mr. SPRINGMEYER.—(Reading:) Sixth Interrogatory. If your answer to the fifth interrogatory is that the said ranches and automobile

were in the possession and under the management or control of your mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control.

Mr. GOODMAN.—We object to the question on the ground that it calls for a conclusion of law and defining the sort of an agreement or lease. The existence of an agreement or lease is a conclusion which must be arrived at from a knowledge of the facts and the circumstances which go to make up the agreement; and on the further ground that there is not now the foundation for that question. In other words, it assumes the other question was answered and in evidence.

The COURT.—I will sustain the objection to that question.

Mr. SPRINGMEYER.—Exception on the same grounds as before. (Reads:) Seventh Interrogatory. If your answer to the sixth interrogatory is that your mother, Elizabeth A. Rodgers was in possession and had the management and control of said ranches and automobile under an oral lease and agreement, please state what the terms of said oral lease and agreement were.

Mr. SPRINGMEYER.—(Reads:) A. My mother leased the property from me under an agreement to operate it and pay me half of the actual net profits therefor.

Mr. SPRINGMEYER.—(Reads:) Who, if you know, paid the operating expenses of said Reserva-

(Testimony of Dr. Donald Maclean.)

tion or said Rodgers ranches for the month of July, 1919?

Mr. SPRINGMEYER. — (R e a d s :) A. My mother, Elizabeth A. Rodgers. Eleventh Interrogatory. Who, if you know, were in active charge of said ranches during the month of July, 1919, as the superintendent thereof? A. W. R. McCulloch.

Twelfth Interrogatory. If you know, please state who employed and paid such superintendent. A. My mother, Elizabeth A. Rodgers. [143] Thirteenth Interrogatory. Have you at any time since the said ranches and automobile came into your ownership, exercised any control or management of the same, either directly or through any person or persons acting as your employee or employees, agent or agents, or representative or representatives? A. Yes.

Mr. SPRINGMEYER.—(Reads Cross-Interrogatories and deposition of Millie L. Rodgers.) Thirteenth cross-interrogatory. If your answer to the last cross-interrogatory was in the affirmative, then state why you admitted under oath that Fred Davis was your servant in your employ and operating the automobile in question under your direction and control in the course of his employment?

A. I didn't understand that I was admitting anything except the ownership of the ranch when I read the answer. Later, through discussion with my attorney, John E. Bennett, the error was dis-

(Testimony of Dr. Donald Maclean.)

covered, he not fully understanding the situation at that time.

Mr. GOODMAN.—I object to the last part as not responsive.

The COURT.—That may go out.

Mr. SPRINGMEYER.—(R e a d s Fourteenth Cross-Interrogatory.) Had you communicated all the matters contained in your answer to your attorneys at the time your first answer was filed?

A. No. I answered at the time what questions my attorney asked, but he did not ask me if Davis was my servant in my employ and operating the automobile under my direction and control in the course of his employment. My attention was not called to this particular feature when I read the answer. I naturally signed the paper which the attorney presented to me which I thought covered the ownership of the ranch and he knew of the deeds to me.

**Deposition of Mrs. Elizabeth A. Rodgers, for
Defendant.**

Thereupon the deposition of Mrs. ELIZABETH A. RODGERS was offered in evidence.

Mr. SPRINGMEYER.—(Reads:) Second Interrogatory. Were you during all of the month of July, 1919, in the possession, management and control of those certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers Ranch, and Ford automobile used in con-

(Deposition of Mrs. Elizabeth A. Rodgers.)
nection with the operation of said properties?
[144]

Mr. GOODMAN.—Same objection we have noted to similar questions in the previous depositions; that the evidence is incompetent and calls for a legal conclusion.

The COURT.—The same ruling and exception.

Mr. SPRINGMEYER.—(Reading:) A. I was. Third interrogatory. Who at said time was the owner of said ranches and of said automobile?

Mr. Goodman objects. The Court sustains the objection and allows Mr. Springmeyer's exception.

Mr. SPRINGMEYER.—(Reading:) A. My daughter, Millie L. Rodgers. Fourth Interrogatory. If you have answered that you were during the month of July, 1919, in the possession, management and control of said ranches and of said automobile, and that your daughter, Millie L. Rodgers was the owner thereof, please state under what sort of lease, agreement or understanding you were so in possession, management and control. A. Under oral lease.

Mr. SPRINGMEYER.—(Reads:) If you have stated in answer to a previous interrogatory that you were in the possession, management and control of that property under an oral lease and agreement, please state the terms of that lease and agreement?

A. I leased the ranch under an agreement with my daughter, Millie L. Rodgers that I would oper-

(Deposition of Mrs. Elizabeth A. Rodgers.)

ate it, and as rent therefor, give her one-half the actual net profits.

Mr. SPRINGMEYER.—(Reads:) Who received the profits, if any, arising from the conduct of said ranches during the month of July, 1919? A. I did.

Mr. SPRINGMEYER.—(Reads:) Who, if you know, paid the operating expenses incident to the running of said ranches during said month of July, 1919? A. I did.

Mr. SPRINGMEYER.—(Reading:) Has your daughter, Millie L. Rodgers ever received any of the profits arising from the operation of said ranches or paid any part of the operating expenses thereof? A. No.

The deposition was read without further objection, and the full deposition is as follows: [145]

In the District Court of the United States in and for
the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Interrogatories Propounded to Elizabeth A.
Rodgers, for Defendant.**

Interrogatories to be propounded to ELIZABETH A. RODGERS, a witness on the part of

the defendant, in the above-entitled action, residing in San Francisco.

FIRST INTERROGATORY.

Give your name and place of residence.

SECOND INTERROGATORY.

Were you during all of the month of July, 1919, in the possession, management and control of those certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers ranch and Ford automobile used in connection with the operation of said properties?

THIRD INTERROGATORY.

Who at said time was the owner of said ranches and said automobile?

FOURTH INTERROGATORY.

If you have answered that you were during the month of July, 1919, in the possession, management and control of said ranches and of said automobile and that your daughter, Millie L. Rodgers, was the owner thereof, please state under what sort of lease, agreement or understanding you were so in possession, management and control.

FIFTH INTERROGATORY.

If you have stated in answer to a previous interrogatory that you were in the possession, management and control of that property under an oral lease and agreement, please state the terms of the lease and agreement.

SIXTH INTERROGATORY.

Who received the profits, if any, arising from the conduct of said ranches during the month of July, 1919? [146]

(Deposition of Mrs. Elizabeth A. Rodgers.)

SEVENTH INTERROGATORY.

Who, if you know, paid the operating expenses incident to the running of said ranches during said month of July, 1919?

EIGHTH INTERROGATORY.

Who, if anyone, was in the management of said ranches during said month of July, 1919?

NINTH INTERROGATORY.

Under whose orders did such superintendent so manage said ranches?

TENTH INTERROGATORY.

By whom were the wages of such employees as were employed on said ranch during the month of July, 1919, paid?

ELEVENTH INTERROGATORY.

Has your daughter, Millie L. Rodgers, ever at any time been in direct possession of said ranches or has she ever at any time exercised any management or control over said ranches, either directly or indirectly, or through an agent or agents, employee or employees, representative or representatives?

TWELFTH INTERROGATORY.

Has your daughter, Millie L. Rodgers, ever received any of the profits arising from the operation of said ranches or paid any part of the operation expenses thereof?

W. M. KEARNEY,

CANTWELL & SPRINGMEYER,

Attorneys for Defendant.

**Answers to Interrogatories Propounded to
Elizabeth A. Rodgers, for Defendant.**

The following answers to the above interrogatories submitted to ELIZABETH A. RODGERS were given:

FIRST INTERROGATORY.

Elizabeth A. Rodgers, corner Market and New Montgomery Streets, San Francisco, California.

SECOND INTERROGATORY.

I was.

THIRD INTERROGATORY.

My daughter, Millie L. Rodgers.

FOURTH INTERROGATORY.

Under oral lease. [147]

FIFTH INTERROGATORY.

I leased the ranch under an agreement with my daughter Millie L. Rodgers that I would operate it, and as rent therefor give her half the annual net profits.

SIXTH INTERROGATORY.

I did.

SEVENTH INTERROGATORY.

I did.

EIGHTH INTERROGATORY.

W. R. McCulloch.

NINTH INTERROGATORY.

Mine.

TENTH INTERROGATORY.

By the superintendent and myself.

ELEVENTH INTERROGATORY.

Yes.

TWELFTH INTERROGATORY.

I have paid her half of the net profits and I pay the operating expenses.

ELIZABETH A. RODGERS.

Cross-Interrogatories propounded to ELIZABETH A. RODGERS, a witness on behalf of the defendant:

FIRST CROSS-INTERROGATORY.

The defendant is your daughter, is she not?

SECOND CROSS-INTERROGATORY.

How many children have you?

THIRD CROSS-INTERROGATORY.

From whom did the defendant acquire the Rodgers or Reservation ranch or ranches?

FOURTH CROSS-INTERROGATORY.

Is it a fact that Millie L. Evans has never managed these properties personally or through agents, but that you have always managed them for her?

FIFTH CROSS-INTERROGATORY.

How long and during what periods of time have they been under an oral lease to you? [148]

SIXTH CROSS-INTERROGATORY.

During what period or periods of time since your daughter acquired these properties have they not been under lease to you?

SEVENTH CROSS-INTERROGATORY.

During what period when they were not under lease to you, did you take any part in the management of them, and if so what part, and to what extent?

EIGHTH CROSS-INTERROGATORY.

Is it not a fact that you have always cared for your daughter's properties and attended to her business for her?

NINTH CROSS-INTERROGATORY.

Approximately how many times have you visited these properties since January 1st, 1919, to the present date?

TENTH CROSS-INTERROGATORY.

Is it not a fact that you have kept fully informed concerning the facts in this case and read or heard read both of the answers which the defendant filed?

ELEVENTH CROSS-INTERROGATORY.

Did you counsel with the attorneys for the defendant in this case in behalf of your daughter before her answers were prepared?

TWELFTH CROSS-INTERROGATORY.

Is it not a fact that the answer as originally filed was submitted to you for approval before your daughter signed it?

THIRTEENTH CROSS-INTERROGATORY

Did you make mention of the lease or report the profits from defendant's ranches which you allege to be your portion under the terms of the lease in your income tax return or returns to the United States Government?

FOURTEENTH CROSS-INTERROGATORY.

If your answer to the thirteenth cross interrogation is in the affirmative then state what portion you reported and the year or years in which such report or reports were made?

FIFTEENTH CROSS-INTERROGATORY.

How much experience have you had in ranch management, and when and how did you become experienced? [149]

SIXTEENTH CROSS-INTERROGATORY.

Have you ever acted for the defendant in buying or selling livestock, or fertilizer from her ranches in Lovelock Valley, and if so how frequently?

SEVENTEENTH CROSS-INTERROGATORY.

Are you the active head and manager of all of your interests and businesses?

EIGHTEENTH CROSS-INTERROGATORY.

In your experience you have bought, sold, leased and dealt in a good many properties, have you not?

BOOTH B. GOODMAN,
ROBERT RICHARDS,
Attorneys for Plaintiff.

Answers of ELIZABETH A. RODGERS to Cross-Interrogatories.

FIRST CROSS-INTERROGATORY.

Yes.

SECOND CROSS-INTERROGATORY.

Three: one child by my last husband, and two by my first husband.

THIRD CROSS-INTERROGATORY.

From her father and myself.

FOURTH CROSS-INTERROGATORY.

No, it is not a fact. I have never managed them forher.

FIFTH CROSS-INTERROGATORY.

Since March, 1919.

SIXTH CROSS-INTERROGATORY.

Prior to March, 1919.

SEVENTH CROSS-INTERROGATORY.

Not in management, but in advising from time to time with the manager of the ranch.

EIGHTH CROSS-INTERROGATORY.

No.

NINTH CROSS-INTERROGATORY.

Once, I believe.

TENTH CROSS-INTERROGATORY.

I heard the facts in the case, but I do not recall whether I read or heard read the answers. [150]

ELEVENTH CROSS-INTERROGATORY.

Yes, somewhat.

TWELFTH CROSS-INTERROGATORY.

No.

THIRTEENTH CROSS-INTERROGATORY

Yes.

FOURTEENTH CROSS-INTERROGATORY.

One-half net profits since 1919.

FIFTEENTH CROSS-INTERROGATORY.

I have owned ranches and employed managers therefor since my husband died in 1902.

SIXTEENTH CROSS-INTERROGATORY.

I have several times sold some stock and products reserved from the lease.

SEVENTEENTH CROSS-INTERROGATORY.

I am the active head but not the manager.

EIGHTEENTH CROSS-INTERROGATORY.

Yes.

ELIZABETH A. RODGERS.

**Testimony of Mrs. Ada Nixon, for Plaintiff
(In Rebuttal).**

Thereupon the plaintiff called Mrs. ADA NIXON as a witness in rebuttal, who, being duly sworn, testified as follows:

Mrs. NIXON.—My name is Mrs. Ada Nixon. I am twenty-two years old and resided in Lovelock in 1919. I am acquainted with the plaintiff, J. B. Daniel. I knew him in Lovelock. I could not say I am acquainted with or know Fred Davis when I see him. I remember an occasion in July, 1919, a Mr. Daniel being run over by an automobile on Fourth Street in Lovelock. I was on Fourth Street when it happened.

Q. And did you see Mr. Daniel start across the street before it happened? A. Yes.

Mr. SPRINGMEYER.—We object to the question on the ground it is not proper rebuttal testimony. Counsel should have put that in in his case in chief if he had any witnesses to testify as to what happened there.

The COURT.—It is within the discretion of the Court, and I [151] will allow the question to be answered.

Mr. SPRINGMEYER.—We note an exception on the grounds stated in the objection.

Mr. GOODMAN.—Did you see Mr. Daniel start across the street at the time he was run over?

A. Yes.

Q. At what point did he leave the sidewalk?

(Testimony of Mrs. Ada Nixon.)

Mr. Springmeyer objects. Objection overruled and exception noted.

A. I saw him come in front of the Lovelock Mercantile Bank. He came out of one of those doors there; either the bank or the stairs.

Q. Will you come down here and look at this map, Mrs. Nixon? This is marked "Lovelock Mercantile Store"; that is marked "Stairway" and that is marked "Lovelock Mercantile Bank." Will you point out on there?

A. He came out of here; either one of these places here; either the stairs or the bank.

Mr. SPRINGMEYER.—The same objection to all these questions.

Mr. GOODMAN.—(Q.) Mrs. Nixon, didn't you observe the automobile at the time it struck Mr. Daniel, or immediately afterwards?

Mr. SPRINGMEYER.—Object to that on the ground it is not proper rebuttal evidence.

The COURT.—She can answer that yes or no.

Mr. SPRINGMEYER.—Exception on the grounds stated.

Mr. GOODMAN.—Did you see it?

A. Yes. I noticed the car as it was approaching Mr. Daniel; I cannot say whether or not the driver of the car sounded his horn.

Mr. GOODMAN.—(Q.) At the time that the automobile approached Mr. Daniel, did you observe the position of the driver or the direction he was facing?

(Testimony of Mrs. Ada Nixon.)

Mr. SPRINGMEYER.—Object to that on the ground it is not proper rebuttal evidence, a part of their case in chief, may it please the Court. Our witnesses have been excused and they are reopening [152] this, may it please the Court, and counsel should have put this witness on in the beginning if she is going to testify to anything that had happened.

Mr. GOODMAN.—Yes, your Honor, it does.

The COURT.—What statement made by Mr. Davis does it contradict?

Mr. GOODMAN.—He said that he was watching Mr. Daniel all the time; that he saw him when the car approached and saw him take hold of the fender and lamp of the car. Now of course we have produced no evidence in chief that he did see him, because we didn't have the evidence at that time for that matter, but he did produce evidence that he did see him, that he was watching him.

The COURT.—I will open the case to allow you to ask that question if that is the purpose of it.

Mr. GOODMAN.—That is the purpose of it.

The COURT.—He says he was watching Mr. Daniel all the time, and there was no testimony of Mr. Daniel's to where he was looking.

Mr. SPRINGMEYER.—We take an exception and object to it particularly upon the ground our witnesses have been excused and we have no opportunity to offer evidence in support of our case.

The COURT.—Well, in nearly every case we have rebuttal testimony, and the Court is not responsible

(Testimony of Mrs. Ada Nixon.)

if you excuse your witnesses. It is not safe in any case, and the principal witness to a transaction of this kind. You may answer that question. Simply answer whether you saw or did not see.

A. Yes.

The COURT.—You did see? A. Yes.

Mr. GOODMAN.—State then in which direction he was facing.

Mr. SPRINGMEYER objects on the same grounds. Objection overruled and exception allowed.

A. He was facing the sidewalk, the driver.

Mr. GOODMAN.—(Q.) The driver was facing the sidewalk? A. The sidewalk.

Q. When you observed the driver, how close was he to Mr. Daniel? [153]

A. Well, he was just right—just knocking Mr. Daniel over when I seen him.

Mr. GOODMAN.—That is all.

Mr. SPRINGMEYER.—I move the answer be stricken upon the ground it is not responsive to the question, and we object to the question on the further ground it is not rebuttal evidence and it was not within the limits of your Honor's permission to reopen the case.

The COURT.—Well, I think I will allow the answer to stand.

Mr. SPRINGMEYER.—We except to the ruling of the Court on the grounds stated.

Thereupon, on cross-examination by Mr. SPRINGMEYER, Mrs. Nixon testified:

(Testimony of Mrs. Ada Nixon.)

Mrs. NIXON.—I did not hear whether Mr. Davis sounded his horn. At that time I was standing by my car in front of the Lovelock Mercantile store. I was not talking to any one. I was waiting for some one for about a quarter of an hour, standing there all by myself facing the street. I was facing up street. My car was in front of the Lovelock Mercantile store facing up street. I was right there (indicating on the map). My car was facing toward the railroad toward the east. I was standing out towards the street looking down the street toward the east. I paid some attention to Mr. Davis' car. I saw Mr. Daniel just as he left the sidewalk. He came out of the door at the bank and I saw him just as he left the sidewalk, but I never noticed him any more. I was not paying any attention to Mr. Daniel. I noticed the car start. I was watching the car. There were lots of people in cars on the street; lots of people on the street and cars standing; there were no other cars going by at that time, but there were cars going by, yet not at the time the accident happened. I can't say what attention I was paying. It was two years ago. I watched the car. I haven't given it a thought since that time. I didn't give it any thought at that time. He didn't sound his horn. Well, I thought of it once in a while. It is not a fact that when this case came for trial that I thought of it for the first time. The driver was sitting at the wheel of the car and had [154] his head up towards the sidewalk. I never noticed

(Testimony of Mrs. Ada Nixon.)

Mr. Daniel after he left the sidewalk. I was noticing the car. I looked around after I saw Mr. Daniel. The boy was looking at the sidewalk and I looked over to see what he was looking at. In the first place, I saw Mr. Daniel. My car was between Mr. Daniel and me. I was facing him then. I turned around suddenly and looked up the street where the boy was. I noticed the car. I didn't notice the car was coming at the time I looked at Mr. Daniel. The car wasn't between us. I was standing by the side of the car. I was on the side of the car towards the sidewalk. No, I was standing outside of the car in the street by the car. I was standing by the wheel. The car was not between me and the sidewalk. I was facing towards the sidewalk, and saw Mr. Daniel get off the sidewalk. I then looked at the street. I didn't keep my eyes on Mr. Daniel, because I never saw anything. I saw that car start. I turned around and saw the car and I didn't see Mr. Daniel again.

**Testimony of J. B. Daniels, for Plaintiff
(In Rebuttal).**

Thereupon Mr. J. B. DANIEL was called in rebuttal, and testified as follows:

Mr. GOODMAN.—(Q.) Mr. Daniel, at the time of your accident, when the car was approaching you, I will ask you whether or not the driver sounded the horn?

A. He never sounded the horn.

(Testimony of J. B. Daniel.)

Mr. SPRINGMEYER.—Objected to on the ground it is not proper rebuttal evidence.

The COURT.—Well, he saw the car coming, didn't he? It does not seem to me to be very material anyhow. Sounding the horn would not give him any warning if he saw the car coming.

Thereupon the plaintiff rested, the defendant rested, having no further evidence to offer.

Thereupon the case was argued by counsel for the plaintiff, and a recess taken until 1:30 P. M. At 1:30 P. M. the court reconvened. [155]

Thereupon the Court stated:

The COURT.—I intimated last evening, gentlemen, that I should allow the defendant to ask some questions as to the competency of the driver, but this morning I overlooked it. That testimony may be put in now if you wish it. I do this not because I think the testimony is particularly important, but because of the allegation in the complaint which is denied in the answer. The issue was raised, but I do not regard it as an important issue, because I think if Davis was negligent and the defendant is responsible for his negligence, it is immaterial whether he was competent or incompetent, provided the negligence was the direct cause of the injury, but you may put that testimony in now, if you wish.

Mr. KEARNEY.—If the Court please, the witness we had here for the purpose of showing the competency of the driver has gone home. He was excused and we will have to continue the trial now in order to get that testimony.

(Testimony of J. B. Daniel.)

The COURT.—How long would you want to continue the trial?

Mr. KEARNEY.—I don't know that I can reach him. He has probably gone back to Lovelock. If the Court instructs the jury now, as you have indicated that it is an immaterial matter, I suppose we might as well go on without the testimony.

The COURT.—As long as I have decided to let you put that testimony in, you are entitled to have it if you want it, but the witness should not be excused until the case is over.

Mr. KEARNEY.—I think we will go on, if your Honor please. It would delay the trial and part of the argument is in and I don't know just when I could reach the witness. He is pretty busy farming and we would have to issue another subpoena for him, and rather than have the jury come back, I think we will go on.

The COURT.—Very well.

The arguments were thereupon resumed and concluded. [156]

Mr. GOODMAN.—There are no exceptions, but I would like to ask for a further instruction. May we ask that?

The COURT.—Just a moment.

Mr. KEARNEY.—I would like to save certain exceptions, and have them noted in the record. I have been unable to follow the individual numbers of the instructions offered by the defendant, from number one to twelve, to enable me to take the usual exception on the ground that each of the instruc-

tions submitted by the defendant correctly states the law applicable under the issues presented by the pleadings, and is not covered by any instructions given by the Court; so I will, in the absence of the segregation of the instructions, make it with reference to each and every of the instructions offered by the defendant, from one to twelve, inclusive.

The COURT.—Under the practice in this court, I do not think that will do, Mr. Kearney. It is almost impossible, where such a multitude of instructions are asked, and so many of them cover the same point, for me to read them all; but you have this opportunity to put your finger on any misstatement of the law; and if I have omitted anything it should be called to my attention so that I can now instruct the jury.

Mr. KEARNEY.—It has been rather difficult. I was trying to follow the instructions as you went along to see which parts were omitted. There have been some parts omitted, and additions made.

The COURT.—Do you remember any parts that have been omitted?

Mr. KEARNEY.—I could not follow the Court.

The COURT.—If there has been any special part omitted, I would be glad to give it.

Mr. KEARNEY.—With respect to the last clear chance of the plaintiff to avoid the injury; I don't think there was any instruction given with reference to the last clear chance of the plaintiff himself.

The COURT.—I will give that. Is there anything else?

Mr. KEARNEY.—To the instructions given by the Court other than those asked by the defendant, I would like the record to show an exception, as being contrary to and against the law applicable to [157] the case.

The COURT.—In what respect?

Mr. KEARNEY.—With respect to the due care and caution, particularly with respect to the due care and caution necessary on the part of the plaintiff in stepping into a street, and not going to a cross-walk. It is the instruction where he attempted to cross upon nice calculation, or an instruction to that effect.

The COURT.—I will give that one also.

Mr. KEARNEY.—Instruction number 6 I think relates to the last clear chance.

The COURT.—The rule of last clear chance applies just as much to the plaintiff as it does to the defendant. If the plaintiff had an opportunity after he found himself in a critical position, notwithstanding any carelessness on the part of Davis, if the plaintiff had then, after he discovered his condition, an opportunity to save himself, and failed to do it, he would be responsible, provided his failure was the failure to exercise that care which an ordinarily prudent person under the same circumstances would have exercised.

Now as to crossing the street. The plaintiff, or a pedestrian crossing the street is not at liberty to speculate on his chances of getting over before an oncoming automobile. If the automobile was com-

ing rapidly, and he saw it coming, and knew it was coming, and he thought, well, possibly I can get over, I will take the chances, if he is hurt he will himself be responsible, provided his conduct on that occasion is not the conduct of a man who is exercising the ordinary, reasonable prudence of the ordinary man under such circumstances. That is the test in every case, and to be applied to the conduct of both parties.

Mr. GOODMAN.—Your Honor, I suggest an instruction be given on the measure of damages, as to suffering a loss of time.

The COURT.—Have you alleged any loss of time?

Mr. GOODMAN.—Inability to follow the occupation.

The COURT.—Well, that will be considered.

Mr. GOODMAN.—And pain and suffering has not been mentioned. [158]

Whereupon at 4:30 o'clock P. M., the jury retired to consider their verdict, and returned into court at 7:35 P. M. with the following verdict:

“In the District Court of the United States, for the
District of Nevada.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of \$2000.00.

Dated this 4th day of June, 1921.

GEO. A. CAMPBELL,
Foreman."

The judgment of the Court was thereafter and on the 22d day of July, 1921, entered, said judgment being as follows:

"In the District Court of the United States for the District of Nevada.

May Term, 1921.

Honorable E. S. FARRINGTON, Judge.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Judgment.

This cause came on regularly for trial at the May Term, 1921, of this Court, to wit, on the 1st day of June, 1921, by a jury duly impaneled and sworn to try the issue. Mr. Booth B. Goodman and Mr. Robert Richards appeared as attorneys for the plaintiff, and Mr. Wm. M. Kearney and Messrs. Cantwell and Springmeyer on behalf of the defendant. And the jury having heard the testimony offered by the plaintiff and defendant and the in-

structions given by the Court, returned their verdict in favor of the plaintiff for the sum of Two Thousand (\$2,000.00) Dollars, and so they all say. [159]

It is, therefore, considered and ordered that the plaintiff have and recover of and from the defendant, Millie L. Evans, the sum of Two Thousand (\$2,000.00) Dollars with interest thereon at 7% per annum from this date until paid, together with his taxable cost incurred herein amounting to the sum of \$11.50.

Dated and entered July 22, 1921.

Attest:

E. O. PATTERSON,

Clerk.

Upon motion of defendant and upon stipulation of counsel orders were entered by the Court allowing the defendant — days within which a motion for a new trial could be made and entered. And thereupon within the time allowed, and on the 8th day of June, 1921, defendant moved for a new trial, said motion being as follows, to wit:

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Notice of Intention to Move for a New Trial.

To the plaintiff above named and to his attorneys,
Booth B. Goodman, Esq., and Robert Richards,
Esq.:

You and each of you will please take notice that the defendant, Millie L. Evans, whose true name is Millie L. Jones, intends to move the Court for an order to vacate and set aside the verdict of the jury and the judgment of the Court rendered thereon in the case entitled above, and to grant a new trial of said cause upon the following grounds and reasons, to wit:

1. Newly discovered evidence material for the defendant which she could not with reasonable diligence have discovered and produced at the trial.

2. Excessive damages appearing to have been given under the influence of passion or prejudice.

3. Insufficiency of the evidence to justify the verdict of the jury, and that the verdict of the jury is against law. [160]

4. Errors in law occurring at the trial and duly excepted to by the defendant.

Said motion will be made and based upon affidavits hereafter to be filed and served and upon the minutes of the Court including all the pleadings, records, files and evidence herein.

Dated June 8th, 1921.

W. M. KEARNEY,
CANTWELL & SPRINGMEYER,
Attorneys for Defendant.

That on Aug. 24th, 1921, the defendant duly filed her memorandum of errors excepted to during the trial, the said memorandum of errors being as follows, to wit:

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Memorandum of Exceptions Relied Upon on
Motion for a New Trial.**

Comes now the defendant and submits the following memorandum of errors excepted to by defendant at the trial of this cause and relied upon on motion for a new trial herein:

I.

The Court erred in admitting Plaintiff's Exhibit No. 4, the same being City Emergency Ordinance No. 5 of the City of Lovelock, over the objection and exception of defendant. Pp. 55, 56, 57 transcript.

II.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who paid for the supplies of those ranches," the ruling

of the Court having been duly excepted to by defendant. Pp. 59, 60, transcript. [161]

III.

The Court erred in striking out the evidence given on cross-examination of the witness, W. R. McCullough, as to by whom he was employed, the ruling of the Court having been duly excepted to by defendant. P. 60, transcript.

IV.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Well, more directly then, for whom was he working, if you know," to which ruling defendant duly excepted. P. 60, transcript.

V.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "In whose employ, if you know, was Fred Davis on the date this accident occurred," to which ruling defendant duly excepted. Transcript, p. 61.

VI.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who operated, managed or controlled the Rodgers or Reservation Ranches in July, 1919," to which ruling defendant duly excepted. Transcript, p. 62.

VII.

The Court erred in overruling defendant's ob-

jection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "And did you make any physical examination of him," to which ruling defendant duly excepted. Transcript, pp. 64, 65.

VIII.

The Court erred in overruling defendant's objections to Plaintiff's Exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, to which ruling defendant duly excepted. Transcript, pp. 66-71.
[162]

IX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Do the X-ray photographs, or any of them, in your opinion derived from an examination and study you have made of them, show any unnatural conditions which may be the result of injury," to which ruling defendant duly excepted. Transcript, p. 73.

X.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, I will hand you the negatives and the prints, and will ask you if you will take the negative or print and show the jury the photographs and the things which you mention as evidence of injury," to which ruling defendant duly excepted. Transcript, pp. 73, 74, 77.

XI.

The Court erred in overruling defendant's objection to plaintiff's questions on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Q. Did you find from your examination of Mr. Daniel any other unnatural conditions? A. I did. Q. What were they," to which ruling defendant duly excepted. Transcript, p. 81.

XII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, assuming that a man is crossing the street and is run over by a Ford car, the wheels passing over his body, and from left to right, approximately in this direction (showing); and assuming that the man before being run over was struck by the front of the car and thrown a distance of eight feet, in your opinion would it be possible for an injury of that character to produce the conditions you have testified to," to which ruling defendant duly excepted. Transcript, pp. 82, 83. [163]

XIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as follows: "Can you remember and can you state what his physical condition and the condition of his spine was at the time that you treated him at Antioch," to which ruling defendant duly excepted. Transcript, pp. 107, 108.

XIV.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as follows: "Did you at that time in Antioch doctor Mr. Daniel to correct any of the irregularities which you found to exist," to which ruling defendant duly excepted. Transcript, p. 110.

XV.

The Court erred in overruling defendant's objection to plaintiff's permitting the witness, Dr. William F. Crawford, to use plaintiff as a subject for illustration, to which ruling defendant duly excepted. Transcript, p. 110.

XVI.

The Court erred in overruling defendant's objection to the introduction in evidence of the original complaint and the original answer, to which ruling defendant duly excepted. Transcript, pp. 132, 133.

XVII.

The Court erred in overruling defendant's motion for a nonsuit to which ruling defendant duly excepted. Transcript, pp. 133, 134.

XVIII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, W. R. McCullough, as follows: "You have already testified that Mrs Elizabeth A. Rodgers gave you instructions as to the operations and management of the Rodgers Reservation

Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada," [164] to which ruling defendant duly excepted. Transcript, pp. 152, 153.

XIX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "When were you first employed on the Rodgers or Reservation Ranches," to which ruling defendant duly excepted. Transcript, p. 156.

XX.

The Court erred in striking out the testimony of W. R. McCullough on direct examination that he was employed on the Rodgers or Reservation Ranches during July, 1919, the ruling being as follows: "I think I will change that ruling; and the testimony that he was employed during that month will be stricken, and you can question him as to the facts constituting his employment, and how he came into her employment," to which ruling defendant duly excepted. Transcript, pp. 156, 157, 158.

XXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "On the 15th of May, 1917, you had a conversation relative to employment on the Rodgers Ranch with a Mr. Ramsey, did you not," to which ruling defendant duly excepted. Transcript, pp. 158, 159.

XXII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you have a conversation relative to your employment on the Rodgers Ranch as superintendent with Mr. Ramsey before that date, or approximately that date," to which ruling defendant excepted. Transcript, p. 159.

XXIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Where did you have this conversation, Mr. McCullough," to which ruling defendant duly excepted. Transcript, pp. 159, 160. [165]

XXIV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "How did you first happen to go on the Rodgers Ranch as superintendent," to which ruling defendant duly excepted. Transcript, pp. 161, 162.

XXV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "By whom was the offer made to you," to which ruling defendant duly excepted. Transcript, p. 162.

XXVI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination

of the witness, W. R. McCullough, as follows: "After going there did you take orders from Mr. Ramsey as to the management of the ranch," to which ruling defendant duly excepted. Transcript, p. 162.

XXVII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you see any checks previous to the first day of March, 1919, printed in form similar to the checks that are in evidence," to which ruling defendant duly excepted. Transcript, pp. 162, 163.

XXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "During that time did you ever see a check which was signed by Millie L. Evans personally, drawn on the Rodgers Ranch at all," to which ruling defendant duly excepted. Transcript, p. 163.

XXIX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, [166] as follows: "Did you at any time during your entire employment on the ranch ever see a check drawn on the Rodgers Ranch similar to this, signed by the defendant, Millie L. Evans," to which ruling defendant duly excepted. Transcript, p. 163.

XXX.

The Court erred in overruling defendant's ob-

jection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And you do not know of your own knowledge, Mr. McCullough, whether or not Mrs Rodgers used any of those checks that had manager on them or not, do you," to which ruling defendant duly excepted. Transcript, p. 167.

XXXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And the Rodgers Ranch pay-roll account was kept in the bank under the same name all the time you were employed there, wasn't it, Mr. McCullough," to which ruling defendant duly excepted. Transcript, p. 168.

XXXII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "Were you at any time during the month of July, 1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory," to which ruling defendant duly excepted. Transcript, pp. 212, 213, 247.

XXXIII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fourth interrogatory is in the negative, please state if you know who during the

month of July, 1919, was in the possession, management or control of said ranches and automobile," to which ruling defendant duly excepted. Transcript, pp. 213, 247.

XXXIV.

The Court erred in sustaining plaintiff's objection to defendant's [167] question on direct examination of the witness, Millie L. Rodgers, as follows: "Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, State of Nevada, known and described as the Reservation or Rodgers Ranches and of a Ford automobile used in connection with the operation of those properties," to which ruling defendant duly excepted. Transcript, pp. 246, 247.

XXXV.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fifth interrogatory is that the said ranches and automobile were in the possession and under the management or control of your mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control," to which ruling defendant duly excepted. Transcript, pp. 247, 248.

XXXVI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness Ada Nixon, as follows: "And did

you see Mr. Daniel start across the street before it happened," to which ruling defendant duly excepted. Transcript, p. 256.

XXXVII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At what point did he leave the sidewalk," to which ruling defendant duly excepted. Transcript, pp. 256, 257.

XXXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "Will you come down here and look at this map, Mrs. Nixon. This is marked Lovelock Mercantile Store; that is marked stairway, and that is marked Lovelock Mercantile Bank; will you point out on there," to which ruling defendant duly excepted. Transcript, p. 257. [168]

XXXIX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "Mrs. Nixon, did you observe the automobile at the time it struck Mr. Daniel, or immediately afterwards," to which ruling defendant duly excepted. Transcript, p. 257.

XL.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At the

time that the automobile approached Mr. Daniel, did you observe the position of the driver, or the direction he was facing," to which overruling defendant duly excepted. Transcript, pp. 258, 259.

XXI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "State in which direction he was facing," to which ruling defendant duly excepted. Transcript, p. 259.

XLII.

The Court erred in denying defendant's motion to strike out the answer of the witness, Ada Nixon, as follows: "Well, he was just—right knocking Mr. Daniel over when I seen him," to which ruling defendant duly excepted. Transcript, p. 259.

XLIII.

The Court erred in refusing to strike from the record the following answer of the witness J. B. Daniel: "It was traveling all of twenty miles an hour," the defendant being duly entitled to an exception. Pp. 7-8, Transcript.

XLIV.

The Court erred in sustaining plaintiff's objection to defendant's question on the direct examination of defendant's witness W. R. McCullough, as follows: "You have already testified that Mrs. Elizabeth Rodgers gave you instructions as to the operation and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase

any supplies from the Lovelock Mercantile Company of Lovelock, [169] Nevada," to which ruling the defendant duly excepted. Transcript, pp. 152-53.

XLV.

The Court erred in striking from the record on his own motion, during the cross-examination of the witness W. R. McCullough, all of said witness' testimony as to the relation of employer and employee between said witness and Mrs. Rodgers, wherein the Court stated as follows: "His answer to the effect that he was in her employ during the month of July, unless the question will be permitted as to when he entered into that employment," to which the defendant duly excepted. Transcript, pp. 157-8.

XLVI.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness W. R. McCullough, as follows: Did you see him drive and operate the car at various times," to which the defendant duly is entitled to an exception. Transcript, pp. 139-40.

XLVII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness Elizabeth A. Rodgers, as follows: "Were you during all the month of July, 1919, in the possession, management and control of these certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers

Ranch and Ford automobile used in connection with the operation of said properties," to which ruling defendant duly excepted. Transcript, p. 251.

XLVIII.

The Court erred in refusing to give in *totidem verbis* defendant's requested instructions marked and numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, to which ruling defendant duly excepted. Transcript, pp. 267 to 287, inclusive.

W. M. KEARNEY,

CANTWELL & SPRINGMEYER,

Attorneys for Defendant. [170]

State of Nevada,

County of Washoe,—ss.

W. M. Kearney, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the action entitled above; that he has read the above and foregoing memorandum of Exceptions relied upon on motion for a new trial, and knows the contents thereof; that in his judgment the same are well taken in the law.

W. M. KEARNEY.

Subscribed and sworn to before me this 24th day of August, 1921.

[Seal]

GEORGIA NEWMAN.

That on December 3d, 1921, the aforesaid motion for a new trial was formally made in open court and argued to the Court and submitted, and that thereafter and on December 23d, 1921, the Court

overruled said motion and denied defendant a new trial, to which defendant excepted.

Thereupon defendant tenders this her bill of exceptions to the action of the Court in the various particulars therein set out, which is signed in open court, sealed and made a part of the record in this case, and the same is hereby settled, approved and allowed.

Dated this 8th day of February, 1922.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. Honorable E. S. Farrington, Judge. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. No. 2270. Bill of Exceptions. Service of Within Bill of Exceptions Admitted Jan. 28, 1922. Booth B. Goodman, Solicitor for Plaintiff. Filed January 28th, 1922. E. O. Patterson, Clerk. [171]

In the United States District Court in and for the
District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation Re Filing of Amended Complaint.

IT IS HEREBY STIPULATED AND AGREED that the plaintiff may amend and file

an amended complaint in the above-entitled action without formal notice or first obtaining an order of the above-entitled Court.

Dated this 17th day of January, 1921.

BOOTH B. GOODMAN and
ROBT. RICHARDS,

Solicitors for Plaintiff.

W. M. KEARNEY and

JOHN E. BENNETT,

Solicitors for Defendant.

[Endorsed]: No. 2270. U. S. Dist. Court, Dist. Nevada. Daniel v. Evans. Stipulation to Amend Complaint. Filed January 22, 1921. T. J. Edwards, Clerk. [172]

In the United States District Court in and for the
District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation Re Amended Answer, etc.

IT IS HEREBY STIPULATED, by and between the plaintiff and defendant in the above-entitled case, by and through their respective attorneys, that the defendant may amend her answer in the above-entitled case without formal motion or notice of motion to the Court.

It is further stipulated that the date for the hearing of said case as now set for the 24th day of February, 1921, may be vacated and that the case may be set for trial on Wednesday, February 9, 1921, at the hour of 10 o'clock A. M. subject, however, to a continuance in the event that the criminal calendar of the Court is not disposed of on that date, in which event the case may be set for a time immediately following the conclusion of the criminal cases to be tried in said court.

BOOTH B. GOODMAN and ROBT. RICHARDS,
Solicitors for Plaintiff.

W. M. KEARNEY and JOHN E. BENNETT,
Solicitors for Defendant.

Dated January 17, 1921.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation. Filed January 22, 1921. T. J. Edwards, Clerk. W. M. Kearney and John E. Bennett, Solicitors for Defendant. [173]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Order Allowing Writ of Error.

This 8th day of February, 1922, came the defendant, by her attorneys, and filed herein and presented to the Court her petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law in the sum of 2500 dollars, which shall operate as a supersedeas bond.

E. S. FARRINGTON.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Allowing Writ of Error. Filed Feb. 8, 1922. E. O. Patterson, Clerk.

Service accepted Feb. 8th, 1922.

BOOTH B. GOODMAN,

Attorney for Plaintiff.

W. M. KEARNEY, Reno, Nevada,

One of the Attorneys for Defendant. [174]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Stipulation Fixing Time to Prepare and File Bill
of Exceptions.**

IT IS HEREBY STIPULATED, by and between the attorneys for the plaintiff and defendant respectively in the above-entitled action, that the defendant may have to and including the 24th day of January, A. D. 1922, within which to prepare, serve and file her bill of exceptions, her petition for allowance of a writ of error, her assignment of errors, and to take such other, further or different steps as are necessary or advisable on the perfection of a writ of error herein.

Dated: January 10th, 1922.

BOOTH B. GOODMAN,

Solicitor for Plaintiff.

W. M. KEARNEY,

Of Solicitors for Defendant.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation. Filed Jany. 12, 1922. E. O. Patterson, Clerk. W. M. Kearney, Solicitor for Defendant. [175]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Affidavit of Service of Copy of Writ of Error.

W. M. Kearney, being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that on the 11th day of February, affiant served upon Booth B. Goodman, Esq., one of the attorneys for the plaintiff herein, by mailing a copy thereof to his office at Lovelock, Nevada, by registered mail, a copy of said writ of error.

W. M. KEARNEY.

Subscribed and sworn to before me this 11th day
of February, 1922.

[Seal]

GEORGIA NEWMAN,

Notary Public in and for the County of Washoe,
State of Nevada.

[Endorsed]: No. 2270. In the District Court of
the United States, in and for the District of Ne-
vada. J. B. Daniel, Plaintiff, vs. Millie L. Evans,
Defendant. Affidavit of Service of Copies of Writ
of Error. Filed Feb. 13th, 1922. E. O. Patterson,
Clerk. W. M. Kearney, Reno, Nevada, One of
the Attorneys for Defendant. [176]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Petition for Writ of Error.

Now comes Millie L. Evans (now Millie L. Jones), defendant herein, and says that on or about the 22d day of July, 1921, this Court entered judgment herein in favor of plaintiff and against this defendant, and that on December 24, 1921, this Court entered an order denying defendant's motion for a new trial in which judgment and proceedings had prior thereunto and subsequent thereunto in denying defendant's motion for a new trial in this cause, certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in defendants behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authen-

ticated, may be sent to the said Circuit Court of Appeals.

W. M. KEARNEY and

CANTWELL and SPRINGMEYER and

JOHN E. BENNETT,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Petition for Writ of Error. Filed Jany. 24, 1922. E. O. Patterson, Clerk. Service Admitted Jan. 24, 1922. Booth B. Goodman, Attorney for Plaintiff. W. M. Kearney, Reno, Nevada, One of the Attorneys for Defendant. [177]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Staying Proceedings Pending Error
Proceedings.**

The defendant, Millie L. Evans (now Millie L. Jones), having on the 24th day of January, 1922, filed her petition for a writ of error from the verdict and judgment made and entered herein also from the order denying defendant's motion for a

new trial, to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed and upon stipulation that all proceedings be stayed pending the giving of said bond.

NOW THEREFORE, it is ordered that all further proceedings in this Court in said cause be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

E. S. FARRINGTON,
U. S. District Judge.

Dated February 8th, 1922.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Staying Proceedings Pending Error Proceedings. Filed Feb. 8, 1922. E. O. Patterson, Clerk. Service accepted Jan. 22, 1922. Attorney for Plaintiff. W. M. Kearney, One of the Attorneys for Defendant. [178]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Extending Time to Prepare, Serve and File
Bill of Exceptions—Dated August 24, 1921.**

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including five days after the Court rules upon the defendant's motion for a new trial herein within which to prepare, serve and file her bill of exceptions, her petition for allowance of a writ of error, and to take such other, further or different steps as are necessary or advisable on the perfection of a writ of error herein.

Dated August 24, 1921.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel vs. Millie L. Evans. Order. Filed this 24th day of August, 1921. E. O. Patterson, Clerk. W. M. Kearney and Cantwell & Springmeyer, Reno, Nevada, Attorneys for Defendant.
[179]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL;

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Extending Time to Prepare, Serve and File
Bill of Exceptions—Dated July 22, 1921.**

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including August 25th, 1921, within which to prepare, serve and file her memorandum of errors and affidavits, etc., relied on on motion for new trial, her bill of exceptions herein, her petition and specification of errors for allowance of writ of error herein, and to take such other, further or different steps as are necessary or advisable on a motion for new trial and on the perfection of a writ of error herein.

Dated July 22, 1921.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: No. 2270. In the District Court of the United States for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Extending Time. Filed July 22, 1921. E. O. Patterson, Clerk. W. M. Kearney and Cantwell & Springmeyer, Solicitors for Defendant. [180]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Order Extending Time to Prepare, Serve and File
Bill of Exceptions—Dated June 13, 1921.**

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including July 25, 1921, within which to prepare, serve and file her memorandum of errors and affidavits, etc., relied upon on motion for new trial, her bill of exceptions herein, her petition and specification of errors for allowance of writ of error herein, and to take such other, further or different steps as are necessary or advisable on a motion for new trial and on the perfection of a writ of error herein.

It is further ordered that all matters herein, including execution, be stayed to and including July 25, 1921.

Dated June 13, 1921.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Filed June 13, 1921. E. O. Patterson, Clerk.

W. M. Kearney and Cantwell & Springmeyer, Solicitors for Defendant. [181]

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Order Staying Execution.

The defendant herein having filed a bond in the sum of \$2,000.00 conditioned for the payment of the judgment entered in the above-entitled case and the same having been approved by the Court; upon motion of the attorneys for defendant and stipulation of plaintiff and defendant, and good cause appearing therefor, it is hereby ordered that execution on the said judgment be stayed, and the same is hereby, stayed in accordance with said stipulation until the motion for new trial, now pending herein, and the proposed appeal, be heard and decided or otherwise disposed of.

E. S. FARRINGTON,

United States District Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Order Staying Execution. Filed Nov. 8, 1921. E. O. Patterson, Clerk. W. M. Kearney, Solicitors for Defendant. [182]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation Staying Execution of Judgment.

IT IS HEREBY STIPULATED by and between the attorneys for the plaintiff and defendant, respectively, in the above-entitled action, that the execution on the judgment in this matter shall be stayed pending the disposal of the motion for new trial and the petition for writ of error and the proposed appeal herein upon the filing of a corporation surety company bond by the defendant in the sum of Two Thousand Dollars, conditioned for the payment of said judgment in the event that the defendant does not prevail in her motion for new trial or the proposed appeal herein.

IT IS FURTHER STIPULATED that the defendant may have ten days from date hereof within which to file the said bond of Two Thousand Dollars.

BOOTH B. GOODMAN and
ROBT. RICHARDS,

Solicitors for Plaintiff.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER,

Solicitors for Defendant.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation. Filed Nov. 7, 1921. E. O. Patterson, Clerk. By O. E. Benham, Deputy. W. M. Kearney, Solicitor for Defendant. [183]

The premium charged for this bond is \$25.00
per annum.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that MILLIE L. EVANS (now Millie L. Jones) as principal, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the defendant in error, J. B. Daniel, in the full and just sum of \$2500.00, to be paid to said defendant, J. B. Daniel, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and

administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a District Court of the United States for the District of Nevada, in a suit depending in said court, between Millie L. Evans (now Millie L. Jones) defendant, and J. B. Daniel, plaintiff, a judgment was rendered against the said Millie L. Evans, and the said Millie L. Evans having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. B. Daniel citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, on the — day of May next. [184]

Now, the condition of the above obligation is such, that if the said Millie L. Evans (now Millie L. Jones), shall prosecute said writ of error to effect and answer all damages and costs if she fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of
EDWIN JONES. MILLIE L. EVANS.
J. P. JONES. Now MILLIE L. JONES.
FIDELITY and DEPOSIT CO. of MD.
[Seal] By EDGAR H. BENNETT,
 Attorney-in-Fact.
[Seal] M. F. CARLETON,
 Agent,
Approved by Sureties.
 E. S. FARRINGTON,
 District Judge.
Not valid unless countersigned by
 P. L. NELSON,
 Agent.

State of California,
City and County of San Francisco,—ss.

On the 25th day of January A. D. 1922, before me, John McCallan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Edgar H. Bennett, Attorney in Fact, and M. F. Carleton, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the attorney in fact and agent re-

spectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney in Fact and Agent respectively. [185]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

On this 25th day of January in the year One Thousand Nine Hundred and twenty-two before me, V. L. de Figueiredo, a Notary Public, in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Millie L. Evans now Millie L. Jones, known to me to be the same person whose name is subscribed to, and who executed the within instrument, and she duly acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at my office in said City and County of San Francisco,

the day and year in this certificate first above written.

[Seal] V. L. DE FIGUEIREDO,
Notary Public, in and for the City and County of
San Francisco, State of California.

My commission expires June 26, 1922.

[Endorsed]: No. 2270. In the District Court of
the United States, in and for the District of
Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans,
Defendant. Bond. Filed Feb. 10, 1922. E. O.
Patterson, Clerk. [186]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Assignment of Errors.

Millie L. Evans (Now Millie L. Jones), the defendant in the above entitled action, filing herewith her petition praying for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court made and entered on the 22d day of July, 1921 in favor of the plaintiff and against said defendant and from the orders and proceedings had prior to the said judgment and subsequent thereto in deny-

ing defendant's motion for a new trial all to the prejudice of said defendant, now assigns as errors in said judgment, decree and rulings of the Court in said action, the following:

I.

The Court erred in admitting Plaintiff's Exhibit No. 4, the same being City Emergency Ordinance No. 5, of the City of Lovelock, Nevada, over the objection and exception of defendant. The testimony relative thereto being as follows:

"Mr. RICHARDS.—If the Court please, we desire to offer in evidence City Emergency Ordinance number 5, of the City of Lovelock, certified to under the seal of the clerk of the city.

"The COURT.—Is there any objection?

"Mr. KEARNEY.—We object to the offer, if the Court please, first upon the ground it is not within the issues of the complaint; there is no allegation in the complaint sufficient to support the offer, and it is therefore incompetent, irrelevant and immaterial. There is no issue in the complaint showing that such an ordinance was in force and effect at the date alleged in the complaint, and it therefore becomes incompetent, irrelevant and immaterial." P. 51, Transcript. [187]

II.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who paid for the supplies of those ranches," the ruling of the Court having been duly excepted to by defendant. Pp. 59, 60, Transcript.

III.

The Court erred in striking out the evidence given on cross-examination of the witness, W. R. McCullough, as to by whom he was employed, the ruling of the Court having been duly excepted to by defendant. Pp. 60, Transcript.

IV.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Well, more directly then, for whom was he working, if you know," to which ruling defendant duly excepted. P. 60, Transcript.

V.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "In whose employ if you know, was Fred Davis on the date this accident occurred," to which ruling defendant duly excepted. Transcript, p. 61.

VI.

The Court erred in sustaining plaintiff's objection to defendant's question on cross-examination of the witness, W. R. McCullough, as follows: "Who operated, managed or controlled the Rodgers or Reservation Ranches in July, 1919," to which ruling defendant duly excepted. Transcript, p. 62.

VII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "And did you make any physical exami-

nation of him," to which ruling defendant duly excepted. Transcript, pp. 64, 65.

VIII.

The Court erred in overruling defendant's objections to Plaintiff's [188] Exhibits Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, to which rulings defendant duly excepted. Transcript, pp. 66, 71.

IX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Do the X-ray photographs, or any of them, in your opinion, derived from an examination and study you have made of them, show any unnatural conditions which may be the result of injury," to which ruling defendant duly excepted. Transcript, p. 73.

X.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, I will hand you the negatives and the prints, and will ask you if you will take the negative or print and show the jury the photographs and the things which you mention as evidence of injury," to which ruling defendant duly excepted. Transcript, pp. 73, 74, 77.

XI.

The Court erred in overruling defendant's objection to plaintiff's questions on direct examination of the witness, Dr. William Neave Kingsbury, as

follows: "Q. Did you find from your examination of Mr. Daniel any other unnatural conditions? A. I did. Q. What were they," to which ruling defendant duly excepted. Transcript, p. 81.

XII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William Neave Kingsbury, as follows: "Doctor, assuming that a man is crossing the street and is run over by a Ford car, the wheels passing over his body, and from left to right, approximately in this direction (showing); and assuming that the man before being run over was struck by the front of the car and thrown a distance of eight feet, in your opinion would it be possible for any injury of that character to produce the conditions you have testified to," to which ruling defendant duly excepted. Transcript, pp. 82, 83. [189]

XIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as follows: "Can you remember and can you state what his physical condition and the condition of his spine was at the time that you treated him at Antioch," to which ruling defendant duly excepted. Transcript, pp. 107, 108.

XIV.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Dr. William F. Crawford, as fol-

lows: "Did you at that time in Antioch doctor Mr. Daniel to correct any of the irregularities which you found to exist," to which ruling defendant duly excepted. Transcript, p. 110.

XV.

The Court erred in overruling defendant's objection to plaintiff's permitting the witness, Dr. William F. Crawford, to use plaintiff as a subject for illustration, to which ruling defendant duly excepted. Transcript, p. 110.

XVI.

The Court erred in overruling defendant's objection to the introduction in evidence of the original complaint and the original answer, to which ruling defendant excepted.

"Mr. GOODMAN.—If the Court please, we desire to offer in evidence the original complaint in this action in connection with the original answer of the defendant herein. It is offered for the purpose of showing the admissions which the defendant has made in the verified answer to the verified complaint; and particularly the admission of the third paragraph of the complaint; and it is necessary to introduce both the complaint and the answer for the reason that the answer is: 'Third. Defendant admits the matters and things in the third paragraph of plaintiff's complaint contained.'

"Mr. SPRINGMEYER.—We object, may it please the Court, to the admission of these pleadings, on the ground that judicial admissions, which these are, are never admissible in evidence as such.

“The COURT.—I shall overrule the objection.”
Transcript, pp. 132, 133.

XVII.

The Court erred in overruling defendant’s motion for a nonsuit to which ruling defendant duly excepted. Transcript, pp. 133, 134.

XVIII.

The Court erred in sustaining plaintiff’s objection to defendant’s question on direct examination of the witness, W. R. McCullough, as follows: “You have already testified that Mrs. Elizabeth Rodgers gave you instructions to the operations and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada,” to which ruling defendant duly excepted. Transcript, pp. 152, 153.

XIX.

The Court erred in overruling defendant’s objection to plaintiff’s question on cross-examination of the witness, W. R. McCullough, as follows: “When were you first employed on the Rodgers or Reservation Ranches,” to which ruling defendant duly excepted. Transcript, p. 156.

XX.

The Court erred in striking out the testimony of W. R. McCullough on direct examination that he was employed on the Rodgers or Reservation Ranches during July, 1919, the ruling being as follows: “I think I will change that ruling; and the testimony that he was employed during that month

will be stricken, and you can question him as to the facts constituting his employment, and how he came into her employment," to which ruling defendant duly excepted. Transcript, pp. 156, 157, 158.

XXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "On the 15th of May, 1917, you had a conversation relative to employment on the Rodgers Ranch with Mr. Ramsey, did you not," to which ruling defendant duly excepted. Transcript, pp. 158, 159. [191]

XXII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you have a conversation relative to your employment on the Rodgers Ranch as superintendent with Mr. Ramsey before that date, or approximately that date," to which ruling defendant excepted. Transcript, p. 159.

XXIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Where did you have this conversation, Mr. McCullough," to which ruling defendant duly excepted. Transcript, pp. 159, 160.

XXIV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows:

"How did you first happen to go on the Rodgers Ranch as superintendent," to which ruling defendant duly excepted. Transcript, pp. 161, 162.

XXV.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "By whom was the offer made to you," to which ruling defendant duly excepted. Transcript, p. 162.

XXVI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "After going there did you take orders from Mr. Ramsey as to the management of the ranch," to which ruling defendant duly excepted. Transcript, p. 162.

XXVII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you see any checks previous to the first day of March, 1919, printed in form similar to the checks that were in evidence," to which ruling defendant duly excepted. Transcript, pp. 162, 163. [192]

XXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination the witness, W. R. McCullough, as follows: "During that time did you ever see a check which was signed by Millie L. Evans personally, drawn on the Rodgers Ranch at all," to which ruling defendant duly excepted. Transcript, p. 163.

XXIX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "Did you at any time during your entire employment on the ranch ever see a check drawn on the Rodgers Ranch similar to this, signed by the defendant, Millie L. Evans," to which ruling defendant duly excepted. Transcript, p. 163.

XXX.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And you do not know of your own knowledge, Mr. McCullough, whether or not Mrs. Rodgers used any of those checks that had manager on them or not, do you," to which ruling defendant duly excepted. Transcript, p. 167.

XXXI.

The Court erred in overruling defendant's objection to plaintiff's question on cross-examination of the witness, W. R. McCullough, as follows: "And the Rodgers Ranch pay-roll account was kept in the bank under the same manner all the time you were employed there, wasn't it, Mr. McCullough," to which ruling defendant duly excepted. Transcript, p. 168.

XXXII.

The Court erred in sustaining the plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers as follows: "Were you at any time during the month of July,

1919, in the possession, management or control of the ranches and automobile described in the previous interrogatory," to which ruling defendant duly excepted. Transcript, pp. 212, 213, 247.

XXXIII.

The Court erred in sustaining plaintiff's objection to defendant's [193] question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fourth interrogatory is in the negative, please state if you know who during the month of July, 1919, was in the possession, management or control of said ranches and automobile," to which ruling defendant duly excepted. Transcript, pp. 213, 247.

XXXIV.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "Were you during all of the year 1919 the owner of those certain ranches situated in Pershing County, State of Nevada, known and described as the Reservation or Rodgers Ranches and of a Ford automobile used in connection with the operation of those properties," to which ruling defendant duly excepted. Transcript, pp. 246, 247.

XXXV.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness, Millie L. Rodgers, as follows: "If your answer to the fifth interrogatory is that the said ranches and automobile were in the possession and under the management or control of your

mother, Elizabeth A. Rodgers, please state under what sort of agreement, lease or other arrangement your mother had such possession, management and control," to which ruling defendant duly excepted. Transcript, pp. 247, 248.

XXXVI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "And did you see Mr. Daniel start across the street before it happened," to which ruling defendant duly excepted. Transcript, p. 256.

XXXVII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At what point did he leave the sidewalk," to which ruling defendant duly excepted. Transcript, pp. 256, 257. [194]

XXXVIII.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "Will you come down here and look at this map, Mrs. Nixon. This is marked Lovelock Mercantile Store; that is marked stairway, and that is marked Lovelock Mercantile Bank; will you point out on there," to which ruling defendant duly excepted. Transcript, p. 257.

XXXIX.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination

of the witness, Ada Nixon, as follows: "Mrs. Nixon, did you observe the automobile at the time it struck Mr. Daniel, or immediately afterwards," to which ruling defendant duly excepted. Transcript, p. 257.

XL.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "At the time that the automobile approached Mr. Daniel, did you observe the position of the driver, or the direction he was facing," to which ruling defendant duly excepted. Transcript, pp. 258, 259.

XLI.

The Court erred in overruling defendant's objection to plaintiff's question on direct examination of the witness, Ada Nixon, as follows: "State in which direction he was facing," to which ruling defendant duly excepted. Transcript, p. 259.

XLII.

The Court erred in denying defendant's motion to strike out the answer of the witness, Ada Nixon, as follows: "Well, he was just—right knocking Mr. Daniel over when I seen him," to which ruling defendant duly excepted. Transcript, p. 259.

XLIII.

The Court erred in refusing to strike from the record the following answer of the witness J. B. Daniel, "It was traveling all of twenty miles an hour," the defendant being duly entitled to an exception. Transcript, pp. 7, 8. [195]

XLIV.

The Court erred in sustaining plaintiff's objection to defendant's question on the direct examination of defendant's witness, W. R. McCullough, as follows: "You have already testified that Mrs. Elizabeth Rodgers gave you instructions as to the operation and management of the Rodgers or Reservation Ranches during the month of July, 1919; pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company of Lovelock, Nevada," to which ruling the defendant duly excepted. Transcript, pp. 152-3.

XLV.

The Court erred in striking from the record on his own motion, during the cross-examination of the witness W. R. McCullough, all of said witness' testimony as to the relation of employer and employee between said witness and Mrs. Rodgers, wherein the Court stated as follows: "His answer to the effect that he was in her employ during the month of July, unless the question will be permitted as to when he entered into that employment," to which the defendant duly excepted. Transcript, pp. 157-8.

XLVI.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness W. R. McCullough, as follows: "Did you see him drive and operate the car at various times," to which the defendant duly is entitled to an exception. Transcript, pp. 139-40.

XLVII.

The Court erred in sustaining plaintiff's objection to defendant's question on direct examination of the witness Elizabeth A. Rodgers, as follows: "Were you, during all of the month of July, 1919, in the possession, management and control of those certain ranches situated in Pershing County, Nevada, known as the Reservation or Rodgers Ranch and Ford automobile used in connection with the operation of said properties," to which ruling defendant duly excepted. Transcript, p. 251.

[196]

XLVIII.

The Court erred in refusing to give in *totidem verbis* defendant's requested instructions marked and numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, to which ruling defendant duly excepted. Transcript, pp. 267 to 272, inclusive. Said instructions being as follows to wit:

2. "A person has a right to walk anywhere on a highway or street, and is not limited to the right to walk upon sidewalks. But such a person is bound to exercise care according to the circumstances, and is especially bound to the alert and watchful performance of the duty of all travelers on all highways to look where they are going."

3. "It is negligence for a person on foot to cross a public street ahead of a vehicle upon nice calculations of the chances of injury. Ordinary care does not impose upon him the duty to be constantly looking or listening to ascertain if automobiles are approaching, but he must look where he

is going and not walk blindly into danger. If he takes chances to escape danger, he is not exercising due care, and he can have no redress for injuries received in his mistaken effort."

4. "The driver of an automobile has the right to believe that a person on foot, when duly warned in sufficient season, will not cross his path, or attempt to do so, but if he does make such an attempt, it is the duty of the driver to do everything in his power to avert accident. If after being duly warned, the person on foot attempts to cross in front of the automobile, and if then the driver of the automobile does everything in his power to avoid a collision, the injured pedestrian cannot recover damages."

5. "You are instructed that in order for plaintiff to be entitled to recover, he must have been free from negligence which proximately contributed to the injury. Accordingly, even if you find it to be the fact that the driver of the automobile which inflicted the injury was a minor, or was negligently driving the car, yet before you can bring in a verdict for plaintiff you must find that he used ordinary care under the circumstances to escape injury. A plaintiff [197] is not entitled to recover damages for an injury which he could have avoided by the use of due care."

6. "If you believe that the plaintiff had the last clear chance or opportunity to avoid the injury to him, then your verdict should be for the defendant. Even though the driver of the automobile in the first instance was at fault, if the plaintiff had the

last clear opportunity to escape injury by the exercise of due care or proper diligence subsequent to the original act of negligence on the part of the driver and before the injury resulted, then the plaintiff cannot recover. Although the driver of an automobile may be negligent, an injured pedestrian cannot complain if his own subsequent negligence continues to the time of the injury, and was a contributing and efficient cause thereof."

7. "In order that you may find any verdict in the case for the plaintiff you must find from the evidence that at the time of the injury to the plaintiff, Fred Davis was in the employment of the defendant Millie Evans. And if you find from the evidence that at such time the said Fred Davis was the employee of Elizabeth A. Rodgers, then you must find for the defendant."

8. "If you find that the defendant is liable for damages; that the driver of the car was a minor or was guilty of the negligence which caused the injury to plaintiff, and that plaintiff was not guilty of contributory negligence and did not have the last clear chance or opportunity to avoid the injury, then it will be your duty to estimate from the evidence what plaintiff's damages are as a result of the injuries he sustained."

9. "The acts of a chauffeur or driver of an automobile within the authority of his employment, are the acts of a servant or employee."

"If you believe from a preponderance of the evidence that the defendant at the time of the acci-

dent was the master or employer of Fred Davis, who drove the automobile that caused the injury to plaintiff, and that said Fred Davis was under the direction and control of the defendant; and also believe that the injuries to plaintiff were caused by the negligent driver of the automobile, and that plaintiff himself was free from negligence that contributed to the accident and did not have the last clear chance to escape injury, then your verdict [198] should be for plaintiff."

10. "A master or employer is the person who has the control and direction of a servant or employee. A master or employer is responsible for the negligent acts of his servant or employee. Accordingly the employer of Fred Davis, the minor who drove the car at the time the plaintiff was injured, alone is responsible in damages to plaintiff for injuries sustained by plaintiff through the alleged negligence of said Fred Davis in driving the automobile over plaintiff.

"You are instructed that the ownership of the automobile or of the ranches upon which the automobile was used, does not in itself fix liability upon the owner for the accident. Although you believe from the evidence, that defendant, at the time alleged in the complaint was the owner of the Reservation or Rodgers ranches and the automobile driven by Fred Davis, if you find from the evidence Elizabeth A. Rodgers was then in possession of and had the management and control of such ranches and automobile, and that said Elizabeth A. Rodgers or her ranch superintendent had hired

said Fred Davis, and that said Elizabeth A. Rodgers had the direction and control of said Fred Davis, then you are instructing that the defendant, Millicent Rodgers, was not the employer of Fred Davis, and that the plaintiff is not entitled to a verdict in this case."

11. "It is the undisputed evidence that the driver of the automobile which injured the plaintiff was a minor under the age of sixteen years. There is a statute which provides that no person under the age of sixteen years of age shall be permitted to drive or operate any motor vehicle in any incorporated or unincorporated city or town in this state.

"Violation of the statute of this kind does not entitle plaintiff to damages in a civil suit if he himself was at fault. That is to say, if plaintiff was guilty of contributory negligence, or if he had the last clear chance to avoid the accident, then he is not entitled to damages for his injuries resulting from the collision. Moreover, even if the statute was violated by defendant, such violation of the statute must appear to be the proximate cause of the injury before plaintiff is entitled to recover. A statute may require of the owner of a car that it be equipped with certain lights; a [199] violation of that statute would impute negligence to the owner; but the mere violation of that statute does not make that negligent owner liable for injuries not caused by the lack of light on his vehicle. Similarly here, the owner employing a driver under the age of sixteen years is negligent

in so doing, but is responsible only for injuries to others of which the employment of such youthful driver is the proximate cause.”

12. “The jury will bear in mind that the issues of negligence and of proximate cause are separate and distinct. To render the master liable for an injury caused by his servant, that servant must have been himself actually negligent or the master must have been negligent in employing him; and in addition to establishing the existence of such negligence, plaintiff must establish that such negligence was the proximate cause of the injury to plaintiff.”

“In the present case, the undisputed evidence shows that the driver of the car was under the age of sixteen years; the statutes of this state prohibit the owners of motor vehicles from permitting any person of such age to drive such vehicles on the streets of incorporated or unincorporated cities. The act of the employer of such driver in permitting him to drive the car on the streets of a city or town is by law deemed to be negligence on the part of the employer. Hence it follows that every injury of which such negligence is the proximate cause is one for which the employer is civilly responsible. But it does not follow that such an employer is responsible for all injuries that the car may occasion to others while so driven by such an employee. A statute may, for instance, require a car to be equipped with certain lights; a violation of that statute imputes negligence to the person having control of it; but the mere violation of that

requirement of having certain lights does not in itself make the owner liable for injuries which are not caused by the absence of lights. Similarly here, the employer was in law negligent in employing a driver of the prohibited age, and is liable in damages for those injuries of which that negligence is the proximate cause. The plaintiff must establish by the evidence that the particular negligence which is imputed to the employer was in fact the [200] proximate cause of the injury sustained by the plaintiff. If the collision in which plaintiff sustained injury would have occurred had the car been driven by a person over the age of sixteen years, and hence endowed physically and matured as are persons over that age, then it may not be said to have been due to the negligence of the employer in employing a driver of the age of less than sixteen years. And if you find from the evidence, that the only negligence which may be attributed to the employer was that imputed to him by the employment of a driver of that age, then, before you may bring in a verdict for the plaintiff you must also find from the evidence that the immaturity of the driver was the proximate cause of the injury to the plaintiff."

XLIX.

The Court erred in denying defendant's motion for a new trial herein.

W. M. KEARNEY and
CANTWELL & SPRINGMEYER and
JOHN E. BENNETT,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Assignment of Errors. Filed Jany. 24, 1922. E.O. Patterson, Clerk. Service admitted Jan. 24, 1922. Booth B. Goodman, Attorney for Plaintiff. W. M. Kearney, Reno, Nevada. One of the attorneys for Defendant. [201]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Certification of Exceptions to Order of Court Re-
jecting a Portion of Defendant's Bill of Ex-
ceptions.**

In this cause I hereby certify that the defendant herein filed her bill of exceptions on the 28th day of January, 1922, within the time allowed by order made in open court, at which time the plaintiff's attorney was present, and that the settlement of said bill of exceptions came on regularly to be heard on February 8, 1922, and that the plaintiff's attorney objected to that part of said bill of exceptions containing the defendant's twelve requested instructions upon the ground that "it set forth in full twelve instructions requested by defendant, contrary to law and the rules of this court; that it is impossible

to ascertain in what respect the Court failed to instruct the jury or misinstructed the jury, and that no proper exceptions to the Court's charge to the jury were taken''; the Court sustained the said objections interposed by plaintiff's attorney, because in excepting to the instructions given by the Court to the jury, defendant's counsel failed to indicate which, if any, of the proposed twelve instructions had not been covered in the charge of the Court, and ordered the said twelve requested instructions eliminated from said bill of exceptions following page —;

And I further certify that the part of the said bill of exceptions ordered by the Court to be eliminated from said bill of exceptions, before the same was settled and allowed, are as follows, to wit:

At the close of the testimony defendant requested the Court [202] to give to the jury the following instructions:

1.

The burden is upon the plaintiff to establish his case by a preponderance of the evidence, and by a preponderance is meant that the evidence in favor of plaintiff outweighs and is more convincing than that in favor of defendant. That is to say, plaintiff must prove all the allegations in his complaint, not admitted by defendant, by more substantial and convincing evidence than that offered on the part of defendant.

2.

A person has a right to walk anywhere on a highway or street, and is not limited to the right to walk

upon sidewalks. But such a person is bound to exercise care according to the circumstances, and is especially bound to the alert and watchful performance of the duty of all travelers on all highways to look where they are going.

3.

It is negligence for a person on foot to cross a public street ahead of a vehicle upon nice calculations of the chances of injury. Ordinary care does not impose upon him the duty to be constantly looking or listening to ascertain if automobiles are approaching, but he must look where he is going and not walk blindly into danger. If he takes chances to escape danger, he is not exercising due care, and he can have no redress for injuries received in his mistaken effort.

4.

The driver of an automobile has the right to believe that a person on foot, when duly warned in sufficient season, will not cross his path, or attempt to do so, but if he does make such attempt, it is the duty of the driver to do everything in his power to avert accident. If after being duly warned, the person on foot attempts to cross in front of the automobile, and if then the driver of the automobile does everything in his power to avoid a collision, the injured pedestrian cannot recover damages.
[203]

5.

You are instructed that in order for plaintiff to be entitled to recover, he must have been free from negligence which proximately contributed to the

injury. Accordingly, even if you find it to be the fact that the driver of the automobile which inflicted the injury was a minor, or was negligently driving the car, yet before you can bring in a verdict for plaintiff you must find that he used ordinary care under the circumstances to escape injury. A plaintiff is not entitled to recover damages for an injury which he could have avoided by the use of due care.

6.

If you believe that the plaintiff had the last clear chance or opportunity to avoid the injury to him, then your verdict should be for the defendant. Even though the driver of the automobile in the first instance was at fault, if the plaintiff had the last clear opportunity to escape injury by the exercise of due care or proper diligence subsequent to the original act of negligence on the part of the driver and before the injury resulted, then the plaintiff cannot recover. Although the driver of an automobile may be negligent, an injured pedestrian cannot complain if his own subsequent negligence continues to the time of the injury, and was a contributing and efficient cause thereof.

7.

In order that you may find any verdict in the case for the plaintiff you must find from the evidence that at the time of the injury to the plaintiff, Fred Davis was in the employment of the defendant Millie Evans. And if you find from the evidence that at such time the said Fred Davis was

the employee of Elizabeth A. Rodgers, then you must find for the defendant.

8.

If you find that the defendant is liable for damages; that the driver of the car was a minor or was guilty of the negligence which caused the injury to plaintiff, and that plaintiff was not guilty of contributory negligence and did not have the last clear chance or opportunity to avoid the injury, then it will be your duty [204] to estimate from the evidence what plaintiff's damages are as a result of the injuries he sustained.

9.

The acts of a chauffeur or driver of an automobile within the authority of his employment, are the acts of a servant or employee.

If you believe from a preponderance of the evidence that the defendant at the time of the accident was the master or employer of Fred Davis, who drove the automobile that caused the injury to plaintiff, and that said Fred Davis was under the direction and control of the defendant; and also believe that the injuries to plaintiff were caused by the negligent driving of the automobile, and that plaintiff himself was free from negligence that contributed to the accident and did not have the last clear chance to escape injury, then your verdict should be for the plaintiff.

10.

A master or employer is the person who has the control and direction of a servant or employee. A master or employer is responsible for the negligent

acts of his servant or employee. Accordingly the employer of Fred Davis, the minor who drove the car at the time the plaintiff was injured, alone is responsible in damages to plaintiff for injuries sustained by plaintiff through the alleged negligence of said Fred Davis in driving the automobile over plaintiff.

You are instructed that the ownership of the automobile of the ranches upon which the automobile was used, does not in itself fix liability upon the owner for the accident. Although you believe from the evidence, that defendant, at the time alleged in the complaint was the owner of the Reservation or Rodgers Ranches and the automobile driven by Fred Davis, if you find from the evidence Elizabeth A. Rodgers was then in possession of and had the management and control of such ranches and automobile, and that said Elizabeth A. Rodgers or her ranch superintendent had hired said Fred Davis, and that said Elizabeth A. Rodgers had the direction and control of said Fred Davis, then you are instructed that the defendant, Millicent Rodgers, was not the employer of Fred Davis, and that the plaintiff is not entitled to a verdict in this case. [205]

11.

It is the undisputed evidence that the driver of the automobile which injured the plaintiff was a minor under the age of sixteen years. There is a statute which provides that no person under the age of sixteen years of age shall be permitted to drive or operate any motor vehicle in any incorporated or unincorporated city or town in this state.

Violation of a statute of this kind does not entitle plaintiff to damages in a civil suit if he himself was at fault. That is to say, if plaintiff was guilty of contributory negligence, or if he had the last clear chance to avoid the accident, then he is not entitled to damages for his injuries resulting from the collision. Moreover, even if the statute was violated by defendant, such violation of the statute must appear to be the proximate cause of the injury before plaintiff is entitled to recovery. A statute may require of the owner of the car that it be equipped with certain lights; a violation of the statute would impute negligence to the owner; but the mere violation of that statute does not make that negligent owner liable for injuries not caused by the lack of light on his vehicle. Similarly here, the owner employing a driver under the age of sixteen years is negligent in so doing, but is responsible only for injuries to others of which the employment of such youthful driver is the proximate cause.

12.

The jury shall bear in mind that the issues of negligence and of approximate cause are separate and distinct. To render the master liable for an injury caused by his servant, that servant must have been himself actually negligent or the master must have been negligent in employing him; and in addition to establishing the existence of such negligence, plaintiff must establish that such negligence was the proximate cause of the injury to plaintiff.

In the present case, the undisputed evidence shows that the driver of the car was under the age of six-

teen years; that statutes of this state prohibit the owners of motor vehicles from permitting any person of such age to drive such vehicles on the streets of incorporated [206] or unincorporated cities. The act of the employer of such driver in permitting him to drive the car on the streets of a city or town is by law deemed to be negligence on the part of the employer. Hence it follows that every injury of which such negligence is the proximate cause is one for which the employer is civilly responsible. But it does not follow that such an employer is responsible for all injuries that the car may occasion to others while so driven by such an employee. A statute may, for instance, require a car to be equipped with certain lights; a violation of that statute imputes negligence to the person having control of it; but the mere violation of that requirement of having certain lights does not in itself make the owner liable for injuries which are not caused by the absence of lights. Similarly here, the employer was in law negligent in employing a driver of the prohibited age, and is liable in damages for those injuries of which that negligence is the proximate cause. The plaintiff must establish by the evidence that the particular negligence which is imputed to the employer was in fact the proximate cause of the injury sustained by the plaintiff. If the collision in which plaintiff sustained injury would have occurred had the car been driven by a person over the age of sixteen years, and hence endowed physically and matured as are persons over that age, then it may not be said to have been due to the negligence

of the employer in employing a driver of the age of less than sixteen years. And if you find from the evidence, that the only negligence which may be attributed to the employer was that imputed to him by the employment of a driver of that age, then, before you may bring in a verdict for the plaintiff you must also find from the evidence that the immaturity of the driver was the proximate cause of the injury to the plaintiff.

I further certify that defendant duly excepted to said order of the Court striking said requested instructions from the bill of exceptions and the exceptions taken by said defendant to said ruling of the Court are as follows: [207]

The defendant hereby excepts to the ruling and decision of the Court in disallowing that part of the bill of exceptions which set forth in full the twelve instructions requested by the defendant, in that Rule 10 of the Circuit Court of Appeals for the Ninth Circuit does not prohibit the same being set forth, but merely provides that the charge given by the Court shall not be set forth in full.

And upon the further ground that Rule 11 of the Circuit Court of Appeals for the Ninth Circuit provides that the assignment of errors shall set out in *totidem verbis* the instructions refused, and that the bill of exceptions properly contain in *totidem verbis* the instructions refused to which exception had been taken.

E. S. FARRINGTON,
U. S. District Judge.

[Endorsed]: In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Certification of Exceptions to Order of Court Rejecting a Portion of Defendant's Bill of Exceptions. Filed Feb. 28, 1922. E. O. Patterson, Clerk. W. M. Kearney, Reno, Nevada, One of the Attorneys for Defendant. [208]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Exceptions of Defendant to Rulings of Court on
Settlement of Bill of Exceptions.**

The defendant hereby excepts to the ruling and decision of the Court in disallowing that part of the bill of exceptions which sets forth in full the twelve instructions requested by the defendant, in that Rule 10 of the Circuit Court of Appeals for the Ninth Circuit does not prohibit the same being set forth, but merely provides that the charge given by the Court shall not be set forth in full.

And upon the further ground that Rule 11 of the Circuit Court of Appeals for the Ninth Circuit provides that the assignment of errors shall set

out in *totidem verbis* the instructions refused, and that the bill of exceptions properly contain in *totidem verbis* the instructions refused to which exception had been taken.

W. M. KEARNEY and
CARTWELL & SPRINGMEYER,
Attorneys for Defendant.

Service hereby admitted Feb. 7th, 1922.

BOOTH B. GOODMAN,
Attorney for Plaintiff.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Exceptions of Defendant to Rulings of Court on Settlement of Bill of Exceptions.. Filed February 7th, 1922. E. O. Patterson, Clerk. [209]

In the District Court of the United States, in and
for the District of Nevada.

No. 2270.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Opinion on Motion for New Trial.

BOOTH B. GOODMAN and ROBERT RICHARDS, for Plaintiff.

WILLIAM M. KEARNEY, JOHN E. BENNETT and CANTWELL & SPRINGMEYER, for Defendant.

FARRINGTON, District Judge:

It is alleged in the complaint that Fred Davis, a servant of defendant, while employed about her business and within the scope of his employment, negligently drove a Ford car, then owned by defendant, against plaintiff Daniel, and over and across his body. The accident occurred July 28, 1919, in Fourth Street in the city of Lovelock, Nevada. Davis was then about fourteen years of age, and it is alleged that he was driving at a dangerous and excessive rate of speed. An ordinance of the city of Lovelock in force at the time and place, prohibiting the driving of motor vehicles at a rate of speed greater than twelve miles per hour.

In her original answer, verified by herself, defendant admitted that she was "then and there the owner of a certain Ford automobile, which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant and in possession of said automobile as the servant of defendant, and driving and operating the same under defendant's direction and control and in the course of his employment." In her answer to the amended com-

plaint defendant admitted that she was the owner of the Ford automobile, but denied that Fred Davis was her servant or in her employ at the time of the accident, and averred that [210] Davis was at the time driving and operating the car as an employee of defendant's mother, Elizabeth A. Rodgers, who was then in possession and control of the car and of the Reservation or Rodgers ranches under an oral lease from defendant, whereby Elizabeth A. Rodgers had the possession, control and operation of said ranches and automobile, paying defendant as rental therefor one-half of the annual net proceeds. She also alleged that Davis was driving the car with reasonable care when Daniel recklessly and without any care, walked diagonally across the street in the middle of the block in such a manner that Davis could not in the exercise of reasonable care prevent the auto colliding with plaintiff, and that plaintiff had the last clear chance to escape said collision, and that he sustained very minor injuries.

The street where the accident occurred was about 60 feet in width. In his direct testimony Daniel stated that he looked up and down the street before he attempted to cross, and saw three cars parked, but none moving; when he reached the middle of the street he again looked, and saw a car approaching him, thinking that it would pass behind him, he hurried on a few steps further; he looked again, and saw the car coming directly toward him; he jumped, was hit by the car, knocked down, and the car ran over his body, stopping at a point where the forward end of the car was about 80 feet distant from

where his body lay. He testified also that the car was approaching him at a speed of about 20 miles an hour.

There was a trial, resulting in a verdict in favor of the plaintiff for \$2,000. The case now comes up on motion for new trial. Defendant's memorandum of exceptions contains 48 items.

EXCEPTION No. 1.

The objection that Emergency Ordinance No. 5 of the city of Lovelock was inadmissible because it was not set out in the complaint, and there was no allegation that the ordinance was in force at the time the accident occurred, is without merit. It is charged that defendant's servant was driving at an unreasonable, dangerous and excessive rate of speed. The action was not brought to collect a penalty for the violation of the ordinance. The ordinance was not the basis of the action. It was merely evidence offered in support of [211] plaintiff's allegation of negligence. Under our practice it is not essential that evidence should be pleaded, consequently the ordinance was admissible without being set up in the complaint, or even being referred to as provided in section 5072 of the Revised Laws of Nevada.

Brasington vs. South Bound R. R. Co., 89 Am. St. Rep. 905-8;

Opitz vs. Schenck, 174. Pac. 40;

Cragg vs. Los Angeles Trust Co., 98 Pac. 1063, 1066;

Jaquith vs. Worden, 40 L. R. A. (N. S.), 827, 831;

Huddy on Automobiles (5 ed.), Sec. 302;
Caughlin vs. Campbell-Sell Baking Co., 8 L. R.
A. (N. S.) 1001, 1004;
Santina vs. Tomlinson, 171 Pac. 437, 438;
Omaha Street Ry. vs. Larson, 70 Nebr. 391;
Faber vs. St. Paul Ry. Co., 29 Minn., 465, 467;
Scraggs vs. Sallee, 140 Pac. 706, 710.

EXCEPTIONS 2, 3, 4, 5 and 6.

The testimony of the witness McCullough as to who employed him as superintendent of the Rodgers ranches, who paid his salary, who paid for the ranch supplies, and for whom Davis was working under his supervision as superintendent, was excluded on the ground that it was not proper cross-examination, but was part of the defense. (Trans. pp. 59-62.)

If it be conceded that this ruling was erroneous, nevertheless it was harmless, because the same testimony was given by the same witness, and admitted as a part of the defendant's case. (See Trans. pp. 135-138.)

Adams vs. Farnsworth, 37 Pac. 221;
Rice vs. Rankin, 59 N. W. 660;
Bonnett vs. Glattfeldt, 11 N. E. 250;
Chesterfield Mfg. Co. vs. Leota Cotton Mills,
194 Fed. 358;
Wicker vs. Jones, Ann. Cas. 1914B, 1083, 1089;
Bachelder vs. Morgan, Ann. Cas. 1915C, 888,
892.

EXCEPTIONS 7, 8, 9, 10, 11, 12, 13, 14 and 15.

Under plaintiff's allegations of permanent injury, oral testimony, X-ray plates and prints show-

ing his condition at the time of the trial, were properly admitted in connection with subsequent evidence tending to show the conditions so disclosed were due to the accident.

EXCEPTION 16.

It is urged that the Court erred in overruling defendant's objection to the introduction in evidence of the original complaint and original answer. (Trans. pp. 132-133.) This objection, also, is without merit. Though the original answer was superseded by the [212] second answer, and was no longer effective as a pleading, it still operated as an admission on the part of defendant, and as such was properly admitted.

Kilpatrick-Koch Dry-Goods Co. vs. Box, 45
Pac. 629, 631;

In re O'Connor's Estate, 50 Pac. 4, 5;

Johnson vs. Sheridan Lumber Co., 93 Pac. 470,
473;

Meek vs. Deal, 124 Pac. 160, 161;

Reemsnyder vs. Reemsnyder, 89 Pac. 1014,
1015;

Watt vs. Missouri K. & T. Ry. Co. 108 Pac.
811, 812;

Scoville vs. Brock, 118 Am. St. Rep., 975, 978;

Arnd vs. Aylesworth, 29 L. R. A. (N. S.) 638,
642.

EXCEPTION 17.

At the close of plaintiff's case defendant moved the Court to direct the jury to return a verdict in her favor. The motion was overruled. Even if the excluded testimony of McCullough, referred to in

Exceptions 2, 3, 4, 5 and 6, tending, as it did, to show that Davis was not in Mrs. Evans' employ, had been admitted, still there was Mrs. Evans' admission to the contrary in her original answer, verified by herself. There was also evidence that Davis was driving at a high rate of speed, and that his negligence directly caused the injury to Mr. Daniel. Daniel's own testimony shows that he looked before attempting to cross the street, and saw three cars parked, but none in motion; he looked again when he was half way across the street, and then saw the car approaching; believing that it would pass to his rear, he hurried on; a few steps further he looked again. Thus on each of the issues raised in the pleadings there was substantially evidence in favor of plaintiff, hence it was the duty of the Court to submit them to the jury. No authority has been cited for the proposition that unless the preponderance of evidence was in favor of plaintiff the motion for an instructed verdict should have prevailed.

"If," says the Circuit Court of Appeals in *Rochford vs. Pennsylvania Co.*, 174 Fed., 81, 84, "a plaintiff has produced material evidence sufficient, if believed and uncontradicted, to warrant a verdict, no amount of contradictory evidence will authorize the judge to take the question of its effect and weight from the jury."

The Circuit Court of Appeals for this circuit has declared that in order to warrant a directed verdict the case on the testimony must be clear and indis-

putable, and to which there could reasonably [213] be but one opinion.

Alaska Fish, etc. Co. vs. McMillan, 266 Fed. 26,
30;

Simpkins Federal Suit at Law, p. 123.

Finally, by offering testimony after her motion for a directed verdict was overruled, defendant waived the motion and her exception.

Wilson vs. Haley Live Stock Co., 153 U. S.
39, 43;

Simpkins Federal Suit at Law, p. 65.

EXCEPTION 18.

The question propounded was, "You have already testimony that Mrs. Elizabeth A. Rodgers gave you instructions as to the operation and management of the ranches during the month of July, 1919, pursuant to those instructions did you purchase any supplies from the Lovelock Mercantile Company?" In response to a leading question the witness had already testified (Trans. p. 138) that Mrs. Rodgers gave him instructions in the control and operation of the ranches in July, 1919, but there was no evidence as to what the instructions were. The proper method would have been to show what the instructions were, what the witness did in July, 1919, and let the jury determine from the facts whether the things done were in pursuance of the instructions. Later (Trans. p. 153) the witness testified that he bought supplies in July, 1919, which were delivered to the ranch, and sent the bills O. K.'d, to Mrs. Rodgers.

EXCEPTIONS 19 to 30, Inclusive.

McCullough was allowed to testify that Mrs. Rodgers' money was paid for his services on the ranch, and also for Davis' services in driving the automobile during July, 1919 (Trans. p. 136); that they were both in her employ, and that she controlled the operations of the ranch during July, 1919 (Trans. p. 137); that he received instructions from her; that he reported to her regarding the control of the ranch, and that she gave him orders as to the management of the ranches during that month. (Trans. p. 138.)

It was evidently defendant's theory that as touching Mrs. Rodgers' control of the ranches, the employment of McCullough and Davis and the purchase of supplies, the cross-examination could thus be confined entirely to conditions, transactions and relations occurring [214] during the month in which the accident occurred. All the questions covered by exceptions 19 to 30, inclusive, were asked in an attempt to ascertain whether Mrs. Rodgers was the responsible manager of the ranches and therefore the responsible employer of Davis in July, 1919. It was proper on cross-examination to ascertain when and how McCullough and Davis were employed on the ranch (Jones on Evidence, Sec. 829); whether in drawing checks, giving orders and exercising control, Mrs. Rodgers was acting for herself, or as defendant's manager, agent, or partner (Jones on Evidence, Sec. 822). Furthermore, where the testimony in chief consists, as it did, in the interrogatories in question, of opinions and con-

clusions, great latitude is allowed in cross-examination. If defendant's theory as to restricting cross-examination, by confining questions in chief to a short period is correct, why, by confining the questions to a still shorter period, could the cross-examination not have been limited to a still shorter period, could the cross-examination not have been limited to circumstances and transactions occurring within the day, or even within the hour, when the accident occurred?

EXCEPTION 31.

This exception was taken to a question which the witness stated he was unable to answer.

EXCEPTIONS 32, 33, 34, 35 and 47.

The 34th exception relates to an attempt on the part of defendant to prove title to real estate, and to a Ford automobile in one question, to be answered by a yes or no. Though the objection was sustained, the ruling whether correct or not, was harmless, because defendant's ownership of the ranches and the automobile is alleged in the complaint, and not denied in the answer. Defendant sought in each of the interrogatories covered by the above exceptions to draw out a conclusion of the witness that Elizabeth Rodgers, and not defendant, was in the possession, management and control of the ranches and the automobile in July, 1919. The questions called for the opinion of the witness on a material issue of fact presented by the pleadings, to be decided, not by the witness, but by the jury. The ruling was correct.

Watrous vs. Morrison, 39 Am. St. Rep. 139,
145; [215]

Boyle vs. Williams, 20 N. Y. Supp. 727;

Morgan vs. Myers, 113 Pac. 153, 154.

The refusal to permit the witness to answer the interrogatory quoted in the 35th exception was without prejudice, as she was allowed to describe the lease in the following interrogatory. (Trans. p. 248.)

EXCEPTIONS 36, 37, 38, 39, 40, 41 and 42.

The allowance of the questions covered by these exceptions was in my judgment within the discretion of the Court, though a part of the testimony might more properly have been offered during the admission of plaintiff's case in chief.

1 Thompson on Trials, Sec. 346;

Abbott's Tr. Brief, Civil Jury Trials, p. 114;

Cyc. p. 1359;

Philadelphia & Trenton R. R. Co. vs. Stimson,
14 Pet. 448, 462;

Turner vs. United States, 66 Fed. 280, 284.

EXCEPTION 43.

The record does not show any exception was taken to the ruling complained of.

EXCEPTION 44.

This is the same question which was raised under exception 18.

EXCEPTION 45.

The assumption in this question is hardly correct. (Trans. p. 161.) The testimony that McCullough "was employed on the ranches, or got his employment from Mrs. Rodgers," remained in

the record and was not stricken. Furthermore, it was the purpose of the Court to lead counsel to present facts from which the jury could determine who was McCullough's employer, and considerable testimony of that tenor was subsequently given by the witness.

EXCEPTION 46.

Before the case went to the jury defendant was informed that this testimony as to the competency of Davis, would be admitted. In response, Mr. Kearney, counsel for defendant, stated that the witness subpoenaed for the purpose of showing the competency of the driver, had gone home. The Court offered to allow the case to be continued, whereupon Mr. Kearney stated, "I do not know that I can [216] reach him, he has probably gone back to Lovelock. If the Court instructs the jury now, as you have indicated, that it is an immaterial matter, I suppose we might as well go on without the testimony." (Trans. p. 265.)

EXCEPTION 48.

The exception to the instructions is not effective. It should be specific, and direct to each portion of the charge which is considered objectionable, so that the Court may make proper corrections. This was not done.

Rule 10, C. C. A., Ninth Circuit;

8 Ency. Pl. & Pr., p. 259;

Hughes Fed. Proc., p. 370, Sec. 147.

Defendant's motion for a New Trial was overruled, and she will be allowed twenty days within which to take such steps as she may be advised.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Opinion on Motion for New Trial. Filed Jany. 6th, 1922. E. O. Patterson, Clerk. [217]

In the District Court of the United States, in and
for the District of Nevada.

MINUTE ENTRY, MAY 3, 1920.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 3, 1920—Order Continuing
for Term.**

There being no answer to the call of this case, it is ordered that the same be, and is hereby, continued for the term.

MINUTE ENTRY, OCTOBER 4, 1920.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—October 4, 1920—Order Continuing
for Term.**

There being no answer to the call of this case, it

is ordered that the same be, and is hereby continued for the term.

MINUTE ENTRY, JANUARY 3, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—January 3, 1921—Order Setting Case for Trial—January 24, 1921.

The defendant's motion to dismiss coming on regularly for hearing this day, Mr. Kearney appearing for the motion; Mr. Robert Richards, appearing for Mr. Goodman, attorney for plaintiff, opposed. Mr. Richards filed an affidavit in opposition, and asked that the case be set for trial. The premises considered, it is ordered that the motion to dismiss be denied and the case is hereby set for trial by a jury on the 24th instant. [218]

MINUTE ENTRY, JANUARY 22, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—January 22, 1921—Order Vacating and Setting for Trial—February 9, 1921.

Pursuant to stipulation filed this day, it is or-

dered that the setting of this cause for the 24th instant be, and is, vacated, and that the case be reset for the 9th day of February, 1921, subject, however, to the criminal then set for trial, and if reached on that day to follow the trials of criminal matters.

MINUTE ENTRY, FEBRUARY 7, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—February 7, 1921—Order
Vacating Setting for Trial February 9, 1921.**

Upon application of Mr. Kearney, attorney for defendant, it is ordered that the setting of this cause be, and the same is hereby vacated.

MINUTE ENTRY, APRIL 4, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—April 4, 1921—Order Setting
Case for Trial May 9, 1921.**

Upon motion of Mr. R. Richards, the trial of this case is hereby set to follow the criminal cases set for May 9th next.

MINUTE ENTRY, APRIL 30, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS etc.

**Minutes of Court—April 30, 1921—Order Setting
Case for Trial May 9, 1921.**

Upon motion of Mr. Robert Richards, attorney for the plaintiff, it is ordered that the trial of this case be, and the [219] same is hereby set for May 9th next, to follow the criminal cases set for that day.

MINUTE ENTRY, MAY 12, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 12, 1921—Order Vacating
Setting for Trial May 9, 1921.**

Good and sufficient cause appearing therefor, it is ordered that the trial of this cause be, and the same is hereby, continued without date and the former setting vacated.

MINUTE ENTRY, MAY 16, 1921.

No. 2270.

J. B. DANIEL

VS.

MILLIE L. EVANS.

**Minutes of Court—May 16, 1921—Order Setting
for Trial May 23, 1921.**

Upon motion of Mr. Robert Richards, one of the attorneys for the plaintiff herein, it is ordered that the order made and entered on the 12th day of May, last, vacating the setting of this case is hereby vacated upon the grounds that the same was inadvertently made, and this case is hereby set for trial for May 23d, next at ten o'clock A. M.

MINUTE ENTRY, MAY 19, 1921.

No. 2270.

J. B. DANIEL

VS.

MILLIE L. EVANS.

**Minutes of Court—May 19, 1921—Trial Continued
to May 26, 1921.**

Good cause appearing therefor it is ordered that the trial of this case be, and the same is hereby, continued until the 26th instant at 10 A. M.

MINUTE ENTRY, MAY 23, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—May 23, 1921—Trial Continued
to June 1, 1921.**

Upon motion of Mr. Geo. Springmeyer, for and [220] on behalf of Mr. W. M. Kearney, attorney for the defendant herein, opposed by Mr. Robert Richards, one of the attorneys for the plaintiff; and upon the affidavit of Mr. W. M. Kearney, it is ordered that the trial of this case be, and the same is hereby, continued until Wednesday, June 1st, next, at ten o'clock A. M.

MINUTE ENTRY, JUNE 1, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of the Court—June 1, 1921—Trial.

This cause coming on regularly for trial this day, Messrs. Booth B. Goodman and Robert Richards appeared on behalf of the plaintiff; Mr. W. M. Kearney for the defendant. On motion of Mr. Kearney, it is ordered that the firm of Cantwell

& Springmeyer be entered of record as associate counsel for the defendant. Mr. Goodman made his opening statement to the jurors, and the following named were accepted by the parties and duly sworn to try the issue, to wit: Andrew W. Foote, Henry F. Best, Lawrence P. Jacobsen, Stanley G. Palmer, Arthur Noonan, D. I. Bohall, John J. Thiex, A. Belmont, William F. Powers, F. A. Hilygus, Fritz Cordes and Geo. A. Campbell. Mr. Richards read the amended complaint and Mr. Kearney his answer to said amended complaint, to the jury; and Mr. Richards also read his reply to the jury. Upon stipulation of counsel it was ordered that the official reporter, A. F. Torreyson, report these proceedings upon the usual terms. All witnesses were marshaled, sworn and placed under the rule. Stipulated by counsel that both sides might present maps of the street of Lovelock, where the accident occurred without bringing witnesses to prove them. J. B. Daniel called by plaintiff testified from map of street of Lovelock where accident occurred; a pair of torn trousers said to have been worn by plaintiff the day the accident occurred ordered admitted and marked Plff's. Ex. No. 1; two photographs of street in question identified by witness, ordered and admitted and marked Plff's. Ex. No. 2 and 3; City Ordinance No. 5 of the City [221] of Lovelock offered by plaintiff for identification, objected to by defendant, to be argued in the morning. Cora F. Darrah and James A. Meffley called and testified for plaintiff. Thereupon the case was continued until tomorrow morning at

ten o'clock, and the Court admonished the jury not to talk about the case among themselves nor to permit others to discuss it in their presence or hearing, etc.

Court adjourned until tomorrow morning at ten o'clock.

MINUTE ENTRY, JUNE 2, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—June 2, 1921—Trial
(Continued)**

The same counsel and the jury being present the trial of this case was resumed by counsel for the respective parties arguing plaintiff's motion for admittance in evidence of City Ordinance No. 5 of Lovelock, Nevada, and the defendant's objection thereto; upon completion of the arguments the Court ordered the said Ordinance admitted and marked Plff's. Ex. No. 4; W. R. McCullough was called and testified on behalf of plaintiff. Dr. William L. Kingsbury was also called and testified for plaintiff, and during his testimony negatives of X-ray photographs on the prints therefrom were introduced in evidence, these were photographs of the plaintiff's anatomy, J. B. Daniel; the negatives marked with odd numbers, the prints corresponding therewith marked with the following even

numbers, to wit: Plff's. Ex. No. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20. Dr. Wm. F. Crawford called on behalf of the plaintiff and demonstrated his treatment of the plaintiff upon Mr. J. B. Daniel himself. J. B. Daniel recalled by plaintiff during which testimony the original complaint and the original answer thereto were offered in evidence, ordered admitted and marked Plff's. Ex. Nos. 21 and 22 respectively. Admitted under objection of defendant and subject to his exception. Plaintiff rests. Mr. Springmeyer moved the dismissal of the suit; argued by respective counsel; submitted and motion denied by the Court. The jury was again admonished by the Court as heretofore and [222] the case was continued until to-morrow morning at ten o'clock.

Court adjourned until to-morrow morning at ten o'clock.

MINUTE ENTRY, JUNE 3, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—June 3, 1921—Trial
(Continued).**

The same counsel and the jury being present the further trial of this cause was resumed by defendant calling W. R. McCullough, during which testimony checks signed by Ellizabeth A. Rodgers

were testified from, and ordered admitted and marked as follows, to wit: Check for \$3000.00 marked Deft's. Ex. No. "A"; check for \$122.52 marked Deft's. Ex. No. "B"; Check for \$10.24, marked Deft's. Ex. No. "C"; check for \$198.60 marked Deft's. Ex. No. "D"; check for \$338.45 marked Deft's. Ex. No. "E"; check for \$71.43 marked Deft's. Ex. No. "F"; check for \$27.25 marked Deft's. Ex. No. "G"; all dated July 28, 1919. Fred Davis was called by defendant, during which testimony defendant's map of Main Street, Lovelock, offered, ordered admitted and marked Deft's. Ex. No. "H". Mrs. Warren J. Flick and Mrs. C. F. Darrah were called and testified on behalf of defendant. The depositions of Hazel Zunini and double deposition of Mrs. Elizabeth A. Rodgers and her daughter, Millie L. Evans, the defendant herein, were opened and marked by the clerk at the request of Mr. Kearney, offered and read in evidence by him.. The jury was again admonished by the Court as heretofore, and the case was continued until to-morrow morning at 9 o'clock.

Court adjourned until to-morrow morning at 9 o'clock.

MINUTE ENTRY, JUNE 4, 1921.

No. 2270.

J. B. DANIEL

Plaintiff,

vs.

MILLIE L. EVANS.

Defendant.

**Minutes of Court—June 4, 1921—Trial (Continued)
and Verdict.**

The same counsel and the jury being present the further trial of this cause was resumed by the depositions introduced the day previous being read by Mr. Springmeyer. Dr. Donald Maclean was called [223] by defendant and testified from the X-ray plates in evidence herein. The deposition of Mrs. R. H. Beal was marked and opened by the clerk at the request of Mr. Springmeyer, who read same into the evidence. Defendant rests. Mrs. Ada Nixon was called by plaintiff in rebuttal. Case reopened by plaintiff and J. B. Daniel recalled. Both plaintiff and defendant rest. The case was then argued and submitted by respective counsel, and the jury, having been instructed by the Court, to which instructions defendant excepted, retired in charge of the Marshal to deliberate on the case, and at 7:35 o'clock P. M. returned into court with the following verdict, viz: "In the District Court of the United States for the District of Nevada. J. B. Daniel vs. Millie L. Evans. No. 2270. We, the jury in the above-en-

titled cause, find for the plaintiff in the sum of \$2,000.00. Dated this 4th day of June, 1921. Geo. A. Campbell, Foreman." And so they all say. Mr. Kearney asks, and it is granted, the benefit of an exception to the finding of the jury. Upon motion of Mr. Kearney and no objection on the part of the plaintiff, it is ordered that the defendant be, and she is hereby allowed a thirty day stay of execution in order to move for a new trial or take such other steps as she may be advised. Upon motion of Mr. Goodman, and upon consent of counsel, it is ordered that the plaintiff be, and he is hereby granted an additional fifteen days within which to file his cost bill.

Court adjourned until Monday morning at ten o'clock.

MINUTE ENTRY, JUNE 8, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—June 8, 1921—Motion Allowing
Defendant Until Latter Part of July to File
Papers on Appeal.**

Upon motion of Mr. W. M. Kearney, attorney for the defendant herein, it is ordered that upon filing of stipulation of counsel the defendant may have to and until the latter part of July within which to file his necessary papers on appeal. [224]

MINUTE ENTRY, JUNE 13, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—June 13, 1921—Order Allowing to and Including July 25, 1921, to File Papers on Appeal.

Upon stipulation of counsel it is ordered that the defendant herein, be, and she is hereby, allowed to and including July 25th, next, within which to prepare and file the necessary papers on an appeal of this case.

MINUTE ENTRY, JULY 22, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—July 22, 1921—Order Allowing to and Including August 25, 1921, to File Papers on Appeal.

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including August 25th, 1921, within which to prepare, serve and file her memorandum of errors and affidavits, etc., relied on on motion for new trial, her bill of

exceptions herein, her petition and specification of errors for allowance of writ of error herein, and to take such other, further or different steps as are necessary or advisable on a motion for new trial and on the perfection of a writ of error herein.

MINUTE ENTRY, AUGUST 24, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—August 24, 1921—Order Allowing Defendant Five Days After Court Rules on Defendant's Motion for New Trial Within Which to File Bill of Exceptions.

Good cause appearing therefor, it is hereby ordered that the defendant herein have to and including five days after the Court rules upon the defendant's motion for a new trial herein, within which to prepare, serve and file her bill of exceptions, her petition for allowance of a writ of error, and to take such other, further or different steps as are necessary or advisable on the perfection of a writ of error herein. [225]

MINUTE ENTRY, DECEMBER 3, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—December 3, 1921—Argument
on Motion for New Trial.**

This being the time heretofore fixed for hearing argument upon the motion for a new trial, Mr. Booth B. Goodman appeared for the plaintiff; Messrs. W. M. Kearney and George Springmeyer for the defendant. Upon the conclusion of the arguments by counsel for the respective parties the matter was ordered submitted and by the Court taken under advisement.

MINUTE ENTRY, DECEMBER 22, 1921.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—December 22, 1921—Order
Denying Motion for New Trial.**

Ordered that the motion for a new trial, heretofore argued and submitted in this case, be, and the same is hereby denied and the parties and each of them are given twenty days from and after this date to take such steps as they may be advised.

MINUTE ENTRY, JANUARY 24, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—January 24, 1922—Bill of Exceptions Presented and Testimony Therein Ordered Reduced.

This being the time set by defendant's notice for the presentation and allowance of her bill of exceptions, Messrs. Wm. M. Kearney and George Springmeyer appeared for the said bill; Mr. B. B. Goodman for the plaintiff. Mr. Kearney presented for approval and allowance his bill of exceptions which contained a full transcript of the testimony, stating that it had been impossible for him and his associates to reduce his testimony to narrative form owing to the large amount of court work they had been engaged in and he asked the [226] plaintiff to stipulate that the same is correct and should be approved. Plaintiff is willing to stipulate that the testimony and proceedings as set forth in the bill of exceptions, offered, is correct and that the bill of exceptions as here presented containing the reporter's transcript be allowed and sent up to the Court of Appeals. Plaintiff stated that he had no objections to offer to the bill of exceptions as offered or to the allowance of the same by the Court. The defendant asked the Court for an order allow-

ing her twenty days' additional time within which to reduce this testimony to narrative form. Upon this motion, IT IS ORDERED that defendant have to and until the 28th instant within which to reduce the testimony in the bill of exceptions; plaintiff to have to and including February 4th, thereafter within which to file his exceptions thereto; and the matter of the settlement and allowance of said bill of exception will be heard and determined February 7th, 1922, at ten o'clock A. M.

MINUTE ENTRY, FEBRUARY 7, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—February 7, 1922—Bill of Exceptions Presented and Ordered Amended.

This being the time heretofore appointed for representing for approval defendant's bill of exceptions, Mr. Booth B. Goodman appeared for and on behalf of the plaintiff; Mr. Wm. M. Kearney for the defendant. Mr. Kearney presented his bill of exceptions and also plaintiff's objections thereto, and after argument by counsel for the respective parties, it is ordered that the twelve requested instructions of the defendant be stricken from the bill of exceptions; that the depositions of Mrs. Elizabeth A. Rogers and Millie L. Evans be in-

served in the bill following the testimony at page 159; objections numbered one and eight are disallowed; objections numbered two, three and four will be allowed when the last paragraph of the stipulation referred to in objection four is inserted as it is the stipulation; objections five, six and nine will be allowed when corrected [227] to conform to the official reporter's notes; and it is further ordered that the corrected bill of exceptions be presented to-morrow for approval.

MINUTE ENTRY, FEBRUARY 8, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Minutes of Court—February 8, 1922—Order
Approving Bill of Exceptions.**

Counsel for both parties being present, IT IS ORDERED that the alterations to the bill of exceptions as ordered yesterday be made and the said bill of exceptions approved. It is further ordered that all further proceedings herein be stayed in this court pending the appeal to the United States Circuit Court of Appeals at San Francisco, and it is further ordered that citation issue herein returnable to the said United States Circuit Court of Appeals thirty days from the date hereof, and it is further ordered that defendant's writ of error be and the same is hereby approved and allowed.

MINUTE ENTRY, MARCH 9, 1922.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

Minutes of Court—March 9, 1922—Order Extending Time Thirty Days to File Record and Docket Cause.

Good cause appearing, IT IS ORDERED that the defendant be, and she is hereby, allowed thirty (30) days' additional time from the 10th day of March, 1922, within which to prepare and file record on appeal. [228]

In the District Court of the United States, in and for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Certificate and Return to Interrogatories and Cross-Interrogatories.

TO ALL TO WHOM THESE PRESENTS
SHALL COME:

I, E. E. Ely, Notary Public residing and having office at Herington, Kansas, do hereby certify that

pursuant to the stipulation signed by solicitors for the above-named plaintiff and defendant, and dated the 9th day of March, 1921, Mrs. R. H. Beale, the witness named in said stipulation, appeared before me on the 31st day of May, 1921, when I took and completed her answers or depositions to the interrogatories and cross-interrogatories propounded by the said solicitors respectively in the above-named action, the said answers or deposition being hereunto annexed, and I further certify that previous to such answers or deposition being taken, duly administered to the said Mrs. R. H. Beale the following oath: "You do solemnly swear that the testimony you are about to give in the action entitled J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant, will be the truth, the whole truth and nothing but the truth, so help you God."

In testimony whereof, I said notary, have hereunto subscribed my name and affixed my official seal at Herington, Kansas, this 31st day of May, 1921.

[Seal]

E. E. ELY,
Notary Public.

Term expires June 23, 1923. [229]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Stipulation for Taking Deposition.

It is stipulated between the parties hereto that the deposition of Mrs. R. H. Beale, witness for the defendant, residing at 102 N. Eighth Street, Herington, Kansas, upon the interrogatories and cross-interrogatories hereto annexed may be taken by virtue of this stipulation (and without commission or other authority or power) by any Notary Public there residing, at such time as said Notary Public may fix; and the taking of said deposition may be adjourned from time to time to suit the convenience of said Notary Public and said witness, provided that nothing herein contained shall unreasonably delay the trial of this action.

The certificate and seal of said Notary Public shall be sufficient proof of his name and official character, without other or further authentication; all other formalities being hereby expressly waived.

Said deposition when taken shall be mailed by said Notary to the Clerk of the above-entitled Court at Carson City, Nevada, and may be read in evidence by either party, subject only to objection as

to the competency, materiality or relevancy of the testimony set forth therein.

Dated: March 9th, 1921.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER,

Solicitors for Defendant.

ROBERT RICHARDS,

BOOTH B. GOODMAN,

Solicitors for Plaintiff. [230]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Interrogatories Propounded to Mrs. R. H. Beale,
for Defendant.**

Interrogatories to be propounded to Mrs. R. H. Beale, witness of the defendant in the above-entitled action, residing at 102 North Eighth Street, Herington, Kansas:

First Interrogatory.

State your name and residence.

Second Interrogatory.

Were you in Lovelock, Nevada, in the months of July and August, 1919, and if so, for what parts of such months, or of either of them.

Third Interrogatory.

Do you recall having visited a moving picture

performance in Lovelock, Nevada, on or about the 1st day of August, 1919, in company with a Mrs. Flick?

Fourth Interrogatory.

If you have answered the preceding interrogatory in the affirmative, state as nearly as you can the date and the time of the day when you so attended that performance?

Fifth Interrogatory.

State whether or not the plaintiff J. D. Daniel and his wife were present at that performance?

Sixth Interrogatory.

If you have answered that plaintiff and the wife of the plaintiff were present at that performance, state, if you know, where they sat with reference to the seats occupied by Mrs. Flick and yourself?

Seventh Interrogatory.

Was there any conversation between Mr. Daniel and yourself, held during that performance, relative to how he was feeling? [231]

Eighth Interrogatory.

If you have answered the preceding interrogatory in the affirmative, please state that conversation as fully as you can recall it?

Ninth Interrogatory.

At that time and place did Mr. Daniel express any intention of making any trip in the near future?

Tenth Interrogatory.

If you have answered the preceding interrogatory

in the affirmative, please state just what Mr. Daniel said with reference to such trip?

W. M. KEARNEY and
CANTWELL & SPRINGMEYER,
Solicitors for Deft.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Waiver of Right to Propound Cross-Interrogatories.

The *defendant* not desiring to propound cross-interrogatories to Mrs. R. H. Beale, hereby waives his right to include cross-interrogatories in the foregoing stipulation to take the deposition of said witness.

ROBT. RICHARDS and
BOOTH B. GOODMAN,
Solicitors for Plaintiff. [232]

' Ans. to Interog. No. 1.

Mrs. R. H. Beale, 102 North 8th Street, Herington, Kan.

Ans. to Interog. No. 2.

Was in Lovelock about the 10th day of July, 1919 and was in Lovelock several times during the month of August, but cannot remember the dates.

Ans. to Interog. No. 3.

Yes

Ans. to Interog. No. 4

About 8 P. M. about August 1st, 1919.

Ans. to Interog. No. 5.

They were.

Ans. to Interog. No. 6

Mrs. Flick sat at my right, Mrs. Daniel to the right of Mrs. Flick and Mr. Daniel to the right of Mrs. Daniel.

Ans. to Interog. No. 7.

Yes

Ans. to Interog. No. 8.

I asked Mr. Daniel how he was feeling and he replied "fairly well" or words to that effect.

Ans. to Interog. No. 9.

Yes.

Ans. to Interog. No. 10.

Said he was leaving the next day on a motor trip to Tahoe.

In the District Court of the United States in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Answers to Interrogatories by Mrs. R. H. Beale.

Answers to interrogatories propounded to Mrs.
R. H. Beale, witness for the defendant in the above-

entitled action, residing at 102 North Eighth Street, Herington, Kansas, taken by E. E. Ely, of Herington, Kansas, aforesaid, Notary Public:

The said Mrs. R. H. Beale being first duly sworn, on oath deposes and says:

In answer to the first interrogatory:

In answer to the second interrogatory: etc.

Mrs. R. H. BEALE.

Subscribed and sworn to before me this 31st day of May, 1921.

[Seal]

E. E. ELY,
Notary Public.

Term expires June 24, 1923.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation Covering Taking of Deposition. Filed this 4th day of June, 1921. E. O. Patterson, Clerk. Cantwell & Springmeyer, Reno, Nevada, and W. M. Kearney, Attorneys for Defendant. [233]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS.

Defendant.

Stipulation to Take Deposition De Bene Esse.

It is hereby stipulated by and between the parties hereto, that the deposition of Hazel Zunini, a witness for Defendant, may be taken before Horace A. Johnson, Notary Public of the State of California in and for the County of Alameda, at 2127 Center St., Berkeley, California, on Wednesday the 28th day of April, 1920, at 2 o'clock P. M., or on such other day and time as said matter may be postponed by said notary.

The said deposition shall be under oath of the witness administered by said Notary, upon oral question and answer propounded to the witness by counsel, the questions and answers taken down in writing, read and signed by the witness, sealed and signed by the Notary, and transmitted to the clerk of the above-entitled court, to be opened at the trial and read in evidence by the party on behalf of whom the deposition is taken or by either party.

Dated this 24 day of April, 1920.

BOOTH B. GOODMAN,
Counsel for Plaintiff,
W. M. KEARNEY and
JOHN E. BENNETT,
Counsel for Defendant.

Leave to take the foregoing deposition is hereby granted, and this shall serve as commission thereto.

Judge. [234]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Deposition of Hazel Zunini.

BE IT REMEMBERED, that pursuant to the stipulation hereunto annexed, and on the 28th day of April, 1920, at 2127 Center St., Berkeley, Alameda County, California, and at the hour of 2 o'clock P. M., before me Horace A. Johnson, a notary public in and for the said County of Alameda, State of California, personally appeared Hazel Zunini, a witness produced on behalf of the defendant in the above-entitled action, now pending in said court, who being first by me duly sworn was then and there examined and interrogated by John E. Bennett, Esq., of counsel for defendant, Booth B. Goodman, counsel for plaintiff being also present; the witness testified as follows:

(Question by Mr. BENNETT.)

Question: State your name, age and residence.

Answer: Hazel Zunini, 18 years, Lovelock, Nevada.

I am acquainted with him.

Question: Did you know him in July, 1919?

Answer: Just to speak to.

Question: During that month did you observe an accident to Mr. Daniels on the street in Lovelock?

Answer: Yes.

Question: Where were you when you saw that?

Answer: Right in front of the Mercantile Building.

Question: That is, were you standing on the sidewalk?

Answer: Yes.

Question: On what street was that?

Answer: It was Fourth Street at that time.

Question: How far was that from the post office?

Answer: It was right across the street, where I was standing.

Question: What did you see in connection with the accident? [235]

Answer: I saw Mr. Daniels going across the street. I saw a fellow in a Ford. He ran into Mr. Daniels; Mr. Daniels was knocked down.

Question: Where did Mr. Daniels cross the street, on what side of the street and in front of what place?

Answer: I don't remember whether he was coming from the post office or going to it.

Question: Where was he when you first saw him?

Answer: Well, about in the middle of the street.

Question: In which direction was the automobile going?

Answer: The street runs east and west, and the machine was going west.

Question: How does the railroad track run?

Answer: North and South.

Question: On which side of the railroad track is the postoffice?

Answer: West of the railroad track.

Question: Where was Mr. Daniels, with respect to compass point when you first saw him? Was he north of the machine or south of it?

Answer: I can't say that.

Question: Fix it in your mind now where he was when you saw him, was he in the street?

Answer: Yes.

Question: On which side of the machine was he?

Answer: What do you mean?

Question: What side of the street were you standing on?

Answer: On the south side.

Question: When you first saw Mr. Daniels was he on the side of the machine nearest you, or farthest from you?

Answer. Farthest from me.

Question: On which end of the machine was he, in front or behind it?

Answer: I don't know.

Question: Was he ahead of it or in the rear of it?

Answer: I don't know.

Question: What was he doing when you first saw him?

Answer: You mean Mr. Daniels?

Question: Yes.

Answer: It seems to me he was picking himself up. I can't remember [236] that very well.

Question: What do you mean by picking himself up?

Answer: He was trying to get up.

Question: Was he on the ground?

Answer: I suppose he was.

Question: Did you see him after he got on his feet, or did he get on his feet?

Answer: Yes.

Question: What did he do then?

Answer: He just walked over toward that side of the street, toward the post office.

Question: Did he go into the post office?

Answer: I don't know.

Question: Who was in the machine?

Answer: One man; I don't know who it was.

Question: Where was the machine when Mr. Daniels was picking himself up?

Answer: The machine was there too because right after he knocked Mr. Daniels down he stopped.

Question: Did the man get out of the machine or remain in it?

Answer: I didn't see him get out; I don't think he did.

Question: Was Mr. Daniels at the time he was picking himself up on the side of the machine nearest you or nearest the postoffice?

Answer: Nearest the postoffice.

Question: So the machine was between you and Mr. Daniels, from where you stood?

Answer: Yes.

Question: Were any other persons at the place

of the accident beside Mr. Daniels and the man in the machine at any time while you were looking?

Answer: Yes.

Question: Who did you see?

Answer: Mr. Wolf was one.

Question: Who is Mr. Wolf?

Answer: He is a constable. [237]

Question: Where was Mr. Wolf when you first saw him?

Answer: He was talking to the man in the machine.

Question: Where was Mr. Daniels at that time?

Answer: I don't remember.

Question: Had he gone into the postoffice then?

Answer: I don't know.

Question: What else did you see Mr. Wolf do besides talk to the man in the machine?

Answer: That's all. I don't know what he did afterwards.

Question: Did you see anyone else there besides Mr. Daniels, the man in the machine and Mr. Wolf?

Answer: I don't know whether there was anybody there or not.

Question: Whereabouts was the machine with reference to the middle of the street at the time you first saw Mr. Daniels. Was it in the center of the street or to one side?

Answer: I don't remember just where it was.

Question: Was it closest to the curb on your side, or closest to the curb on the opposite side?

Answer: I don't know.

Question: How far from the postoffice was it?

Answer: I don't know.

Question: What became of the machine after Mr. Daniels got up?

Answer: I don't know whether it stayed there or whether it went away.

Question: Did you see Mr. Daniels after the accident?

Answer: Not after I saw him walk towards the postoffice.

Question: Have you talked with him since at any time until today?

Answer: No.

Question: Do you know Mr. Goodman, his counsel?

Answer: Yes, I know him. I have not talked with him about the matter.

Question: Do you know Mrs. Davis in Lovelock?

Answer: I don't remember her at all.

Question: Were you employed in Lovelock at the time in any occupation?

Answer: Yes. [238]

Question: Who were you with?

Answer: With Roberts, Affleck and Deady.

Question: What did they do?

Answer: Lawyers.

Question: Where were their offices?

Answer: In the Mercantile Building.

Question: On what floor?

Answer: Second floor.

Question: Were you looking from those offices at the accident?

Answer: No, I was downstairs, on the sidewalk.

Cross-examination by Mr. GOODMAN.

Q. From the office where you worked you could not see the postoffice at all? A. No.

Q. Isn't (it) a fact that all of the things which you saw happened very quickly? A. Yes.

Q. Can you say whether or not there was many automobiles on the street at the time of the accident? A. I can't remember.

Q. You didn't observe? A. No.

Q. Do you know at what point Mr. Daniels left the sidewalk to cross the street? A. No.

Q. Did you notice where the car started from?

A. I don't know where it started from but I know it was coming west.

Q. What attracted your attention to the car?

A. Well, I don't know. I know it was going west.

Q. Wasn't it the noise of the car that attracted your attention? A. I don't know.

Q. It was a Ford car? A. Yes.

Q. And it was going pretty fast, wasn't it?

A. Well, I can't say. I don't know how fast it was going.

Q. It was not going slowly, was it?

A. I can't remember.

Q. What was Mr. Wolf saying to the man in the machine? A. I don't know.

Q. Have you ever discussed this matter with Mr.

Daniels, myself, or any person representing Mr. Daniels? A. No.

Q. Have you any interest in the outcome of the action? A. No. [239]

(Question by Notary:)

Q. Do you know anything about this matter of interest or benefit to either side, or do you want to say anything farther in the matter? A. No.

HAZEL ZUNINI.

State of California,
County of Alameda,—ss.

I, Horace A. Johnson, a Notary Public in and for said county, do hereby certify that the witness in the foregoing deposition, named Hazel Zunini, was by me duly sworn; that said deposition was then taken at the time and place mentioned in the annexed order, to wit, at my office in the county of Alameda, State of California, and on the 28th day of April, 1920, between the hours of two P. M. and four P. M., of that day; that said deposition was reduced to writing by John E. Bennett, and when completed was carefully read to said witness, and was by her subscribed in my presence.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the county of Alameda, this 28th day of April, 1920.

HORACE A. JOHNSON,
Notary Public.

[Endorsed]: No. 2270. U. S. Dist. Court of Nevada. J. B. Daniel vs. Millie L. Evans. Deposi-

tion of Hazel Zunini. Opened and published June 3, 1921, at request of W. M. Kearney. Filed June 3, 1921. E. O. Patterson, Clerk. [240]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE. L. EVANS,

Defendant.

**Stipulation to Take Deposition De Bene Esse of
W. F. Crawford.**

IT IS HEREBY STIPULATED by and between the above-named parties, through their respective counsel, that the deposition of W. F. Crawford, a witness for plaintiff, may be taken before Robert Wallace, Jr., Notary Public, at the office of said Robert Wallace, Jr., in the town of Brentwood, State of California, on the 29th day of April, 1920, at Two o'clock P. M., or on such other day and time as the matter may be adjourned or postponed by said Notary Public.

The deposition shall be under oath of the witness administered by the Notary, upon oral question and answer propounded to the witness by counsel, the questions and answers taken down in writing, read and signed by the witness, sealed and signed by the Notary, and transmitted to the Clerk

of the above-entitled Court, to be opened at the trial and read in evidence by the party on behalf of whom the deposition is taken or by either party.

Dated this 24th day of April, 1920.

BOOTH B. GOODMAN,
Counsel for Plaintiff.

W. M. KEARNEY and
JOHN E BENNETT,
Counsel for Defendant.

Leave to take the foregoing deposition is hereby granted, and shall serve as commission thereto.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation to Take Deposition *De Bene Esse*. Filed April 28th, 1920. T. J. Edwards, Clerk. Booth B. Goodman, Attorney and Counsellor, Lovelock, Nevada. [241]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

**Stipulation to Take Deposition De Bene Esse of
Hazel Zunin.**

IT IS HEREBY STIPULATED by and between the parties hereto, that the deposition of Hazel Zunini, a witness for defendant, may be taken before H. A. Johnson, Notary Public of the State of California, in and for the County of Alameda, at 2127 Center St., Berkeley, California, on Wednesday, the 28th day of April, 1920, at 2 o'clock P. M., or on such other day and time as said matter may be postponed by said Notary.

The said deposition shall be under oath of the witness administered by said Notary, upon oral question and answer propounded to the witness by counsel, the questions and answers taken down in writing, read and signed by the witness, sealed and signed by the Notary, and transmitted to the Clerk of the above-entitled Court, to be opened at the trial and read in evidence by the party on behalf of whom the deposition is taken or by either party.

Dated this 24 day of April, 1920.

BOOTH B. GOODMAN,
Counsel for Plaintiff,
W. M. KEARNEY and
JOHN E. BENNETT,
Counsel for Defendant.

Leave to take the foregoing deposition is hereby granted, and this shall serve as commission thereto.

E. S. FARRINGTON,
Judge.

[Endorsed]: No. 2270. In the District Court of the United States in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Stipulation to Take Deposition *De Bene Esse* of Hazel Zunini. Filed May 1st, 1920. T. J. Edwards, Clerk. W. M. Kearney and John E. Bennett, 248 Russ Bldg., San Francisco, Calif. Attorneys for Defendant. [242]

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the writ of error heretofore allowed by said court, and include in the said transcript the following papers, proceedings and orders on file, to wit:

1. Petition for writ of error filed January 24, 1922.
2. Assignment of error filed with writ of error January 24, 1922.

3. Order allowing writ of error dated February 8, 1922.

4. Bill of exceptions filed January 28, 1922.

5. Citation on writ of error filed February 8, 1922.

6. Bond on writ of error.

7. All minutes of the court and orders made in the cause.

8. Writ of error.

9. Affidavit of service of copies of writ of error.

10. All stipulations on file in the cause.

11. Depositions of Mrs. R. H. Beale and of Hazel Zunini.

12. All exhibits admitted in the case.

13. Certification of court to defendant's exceptions taken to the order of court striking from the proposed bill of exceptions defendant's instructions. [243]

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: February 10th, 1922.

W. M. KEARNEY and

CANTWELL & SPRINGMEYER,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Praecipe for Transcript of Record. Filed Feb. 13th, 1922. E. O. Patterson, Clerk. W. M. Kearney, Reno, Nevada, One of the Attorneys for Defendant. [244]

In the District Court of the United States for the
District of Nevada.

No. 2270.

J. B. DANIEL

vs.

MILLIE L. EVANS.

**Order Enlarging Time Thirty Days to File Record
and Docket Cause.**

Good cause appearing, it is ordered that the defendant be, and she is hereby, allowed thirty (30) days' additional time from the 10th day of March, 1922, within which to prepare and file record on appeal.

Done in open Court this 9th day of March, 1922.

E. S. FARRINGTON,

Judge.

[Endorsed]: No. 2270. U. S. District Court, District of Nevada. J. B. Daniel vs. Millie L. Evans. Order Extending Time. Filed this 9th day of March, 1922. E. O. Patterson, Clerk. By O. E. Benham, Deputy. [245]

In the District Court of the United States for the
District of Nevada.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the Records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of J. B. Daniel, Plaintiff, vs. Millie L. Evans, also known as Millie R. Evans, and Malvina Evans, Defendant, said case being No. 2270 on the docket **of** said court.

I further certify that the attached transcript, consisting of 247 typewritten pages numbered from 1 to 247 inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the City of Carson, State and District aforesaid.

I further certify that the Defendant's Exhibits Nos. "A," "B," "C," "D," "E," F, G, and H (all in one envelope and marked accordingly) and Plaintiff's Exhibits Nos. 1 to 20 inclusive, all of

which accompany this transcript, to be the original exhibits filed in the above-entitled case, and that Plaintiff's Exhibits Nos. 21 and 22 (Original Complaint and Original Answer) are on file in this office but are represented by true copies and made a part of this transcript.

I further certify that the cost for preparing and certifying to said record, amounting to \$121.80, has been paid to me by W. M. Kearney, Attorney for the plaintiff in error in the above-entitled cause.
[246]

And I further certify that the original writ of error, and the original citation, issued in this cause are hereto attached.

Witness my hand and the seal of said United States District Court this 30th day of March, 1922.

[Seal] E. O. PATTERSON,
Clerk, U. S. District Court, District of Nevada.
[247]

C

[Endorsed]: No. 3855. United States Circuit Court of Appeals for the Ninth Circuit. Millie L. Evans, now Millie L. Jones, Plaintiff in Error, vs. J. B. Daniel, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed April 1, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States to the Honorable
E. S. FARRINGTON, Judge of the District
Court of the United States, for the District of
Nevada, GREETING:

Because, in the record and proceedings, as also
in the rendition of the judgment of a plea which
is in the said District Court before you, between
J. D. Daniel, plaintiff, and defendant in error, and
Millie L. Evans (now Millie L. Jones), defendant,
plaintiff in error, a manifest error hath happened
to the great damage of said Millie L. Evans, plain-
tiff in error, as by said proceeding appears, and
we being willing that error, if any hath been, should
be duly corrected, and full and speedy justice done
to the parties aforesaid in this behalf, do command
you, if judgment therein be given, that then, under
your seal, distinctly and openly, you send the rec-
ord and proceedings, with all things concerning the
same, to the United States Circuit Court of Ap-
peals for the Ninth Circuit, together with this writ,
so that you have the same at the City and

County of San Francisco, in the State of California, on the 10th day of March, A. D. 1922, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, that said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable E. S. FARRINGTON, United States District Judge for the District of Nevada, the 10th day of February, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

E. O. PATTERSON,

Clerk of the United States District Court for the District of Nevada.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Writ of Error. Filed Feb. 10th, 1922. E. O. Patterson, Clerk.

No. 3855. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 1, 1922. F. D. Monckton, Clerk.

In the District Court of the United States, in and
for the District of Nevada.

J. B. DANIEL,

Plaintiff,

vs.

MILLIE L. EVANS,

Defendant.

Citation on Writ of Error (Original).

To J. B. Daniel, the Plaintiff and Defendant in
Error in the Above-entitled Action, GREET-
ING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be
holden at the city of San Francisco, in said circuit,
within 30 days from date, pursuant to a writ of
error filed in the clerk' office of the district court
of the United States for the district of Nevada,
wherein Millie L. Evans (now Millie L. Jones) is
plaintiff in error, and you are defendant in error,
to show cause, if any there be, why the judgment
rendered against the said plaintiff in error, as in
the said writ of error mentioned, should not be
corrected, and why speedy justice should not be done
to the parties in the behalf.

WITNESS the Honorable E. S. FARRINGTON,
District Judge of the United States, at Carson
City, Nevada, within said circuit this 8th day of
February, 1922.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: No. 2270. In the District Court of the United States, in and for the District of Nevada. J. B. Daniel, Plaintiff, vs. Millie L. Evans, Defendant. Citation on Writ of Error. Filed Feb. 8, 1922. E. O. Patterson, Clerk.

Service accepted Feb. 8th, 1922.

BOOTH B. GOODMAN,
Attorney for Plaintiff.

No. 3855. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 1, 1922. F. D. Monekton, Clerk.

No. 3855

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

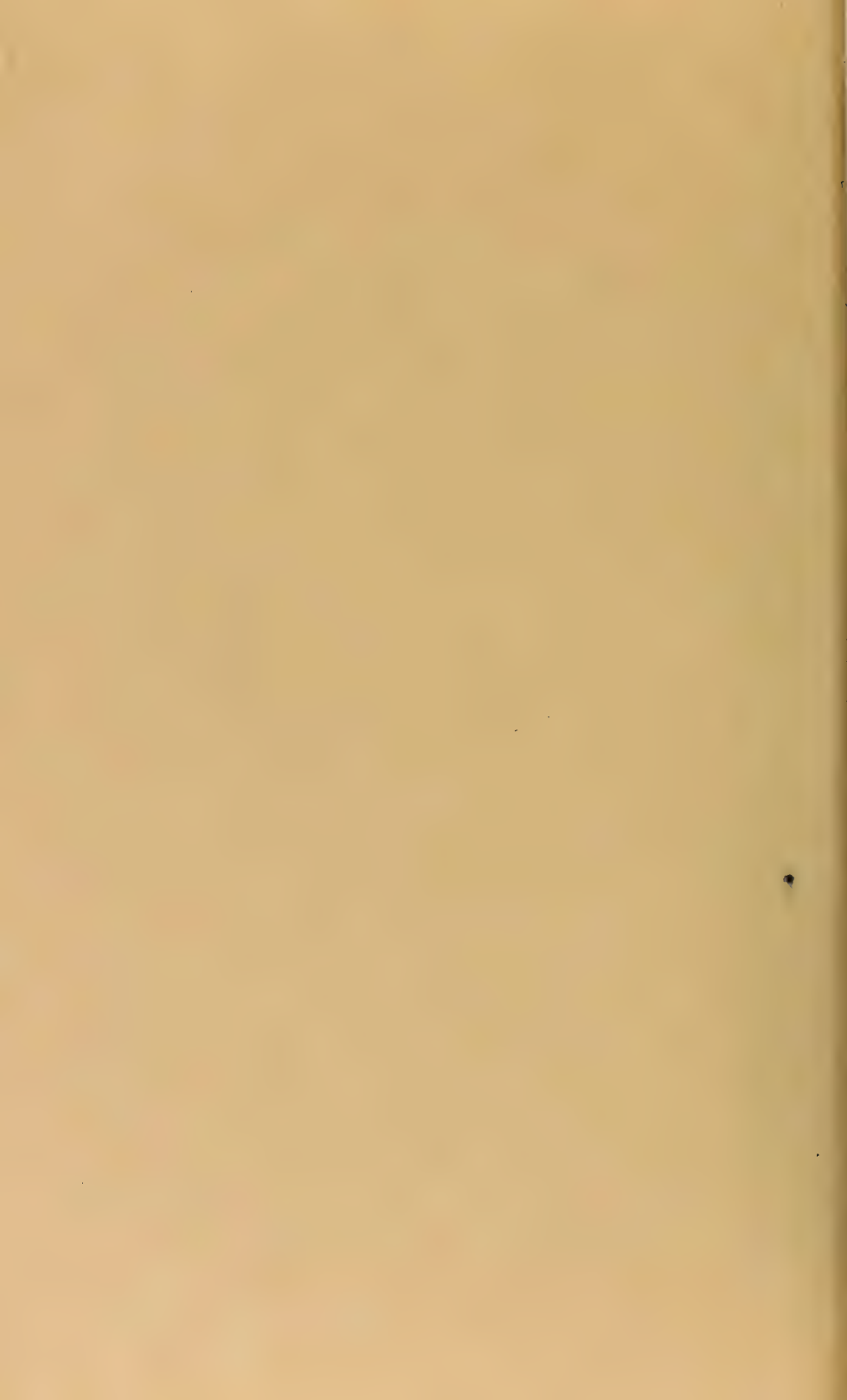
7

MILLIE L. EVANS, now MILLIE L. JONES,	}
<i>Plaintiff in Error,</i>	
VS.	
J. B. DANIEL,	
<i>Defendant in Error.</i>	

BRIEF FOR PLAINTIFF IN ERROR.

W. F. WILLIAMSON,
B. M. AIKINS,
Attorneys for Plaintiff in Error.

FILED
SEP 25 1922
F. D. MONCKTON,
CLERK



No. 3855

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILLIE L. EVANS, now MILLIE L. JONES,	}
<i>Plaintiff in Error,</i>	
VS.	
J. B. DANIEL,	
<i>Defendant in Error.</i>	

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

This case comes up on writ of error to the District Court of the United States for the District of Nevada where judgment was rendered in favor of the plaintiff there who is the defendant in error here.

The action was for damages for injuries sustained by the defendant in error who was struck by a Ford automobile operated by one Fred Davis, in Lovelock, Nevada, while crossing the street on foot.

The original complaint alleges that Davis was at the time of the accident a servant of the plaintiff in error and was in possession of, and operating the

automobile as a servant of plaintiff in error in the course of his employment as such.

This was admitted by the original answer of the plaintiff in error. Thereafter an amended complaint was filed substantially repeating the averments above referred to with some elaboration. To this amended complaint, plaintiff in error interposed an answer in which among other things, she specifically denied said averments.

The only question here involved is whether or not Davis was in fact the employee of the plaintiff in error.

To prove the employment the plaintiff below offered in evidence the answer to his original complaint. This, and nothing more. The answer was admitted in evidence over the objection of the attorneys for the plaintiff in error. Hence there is presented but one question for determination here, and that is whether the admission in evidence of the answer to the original complaint was error. If it was, the judgment must be reversed.

To the ruling of the learned District Judge in admitting this answer an exception was duly taken (Trans. 142).

Specification of Error.

“XVI.”

“The Court erred in overruling defendant’s objection to the introduction in evidence of the

original complaint and the original answer, to which ruling defendant duly excepted. Transcript pp. 132, 133.”

Argument.

This is an action of damages in which it is charged that the defendant in error was injured by a certain Ford automobile.

The third paragraph of the original complaint was as follows:

“That the defendant was then and there the owner of a certain Ford automobile which was then and there being driven along said street by one Fred Davis, said Fred Davis being then and there a servant in the employ of defendant, and in possession of said automobile as the servant of defendant and driving and operating the same under defendant’s direction and control and in the course of his employment.”

The answer to this allegation is in the following words:

“Defendant admits the matters and things in the third paragraph of plaintiff’s complaint contained.”

Thereafter an amended complaint was filed in which it was among other things alleged:

“SECOND.

That at the times hereinafter mentioned one Fred Davis was then and there a servant in the employ of the said defendant and whose duty embraced the business of conveying employees and workmen to and from the ranches

of the defendant to the city of Lovelock and conveying supplies and messages between the said city of Lovelock and said defendant's ranches. That in the course of his employment the said Fred Davis used and was in possession of an automobile furnished to him by defendant and the property of the defendant, and which automobile he was, at the time hereinafter mentioned, operating in the regular course of his employment and under the direction and control of the said defendant through her duly authorized superintendent and ranch manager, W. R. McCulloch.

THIRD.

That on the 28th day of July, 1919, plaintiff was lawfully walking upon and across a public street and thoroughfare in the City of Lovelock, County of Pershing, State of Nevada, then named and known as Fourth Street, but since named Main Street. That the defendant's said servant, Fred Davis, was at the same time and date and in the (20) course of his employment, on the said street and driving an automobile owned by the defendant as aforesaid."

To this amended complaint plaintiff in error answered in due course. The first and second paragraphs of her answer are as follows:

"I.

For answer to paragraph numbered "Second" of the complaint, defendant denies that at the times mentioned in the complaint, or at any other time, or at all, one Fred Davis was a servant in the employ of defendant; denies that in the course of his employment said Fred Davis used and was in the possession of, or used or was in the possession of, an automobile furnished to him by the defendant and the property of the defendant, or of an automobile

furnished to him by the defendant, or which he was operating in the regular course of his employment and under the direction and control of defendant through her ranch superintendent and ranch manager, W. R. McCulloch, or which he was operating in any other manner under the direction or control of defendant.

II.

Answering paragraph numbered "Third" of plaintiff's complaint, defendant denies all the allegations in said paragraph contained save and except that at the time alleged in said paragraph Fred Davis was on the street therein named driving an automobile owned by defendant, and in this behalf defendant is informed and believes and therefore, on such information and belief, alleges the fact to be that plaintiff was then and there walking upon and across said street in an unlawful, careless, negligent and indifferent manner."

At the trial defendant in error offered in evidence the answer to the original complaint for the purpose of showing the admissions of plaintiff in error, and particularly the admission of the third paragraph of the original complaint (Trans. 141).

Plaintiff in error objected and the objection was overruled and an exception duly taken (Trans. 142). Specification of Error No. XVI, Trans. 240.

The admission contained in the original answer constituted the only evidence offered to prove the ownership of the automobile by the plaintiff in error and the employment by her of the driver. Hence the question of the admissibility of the defunct pleading is vital.

There is a decided conflict in the authorities upon the question and no decision upon the point has been discovered by the writer in the Nevada courts, but, as is well known, the courts of Nevada in actual practice ordinarily follow the decisions of the California Supreme Court.

Practically this may be attributed to the propinquity of the two states whose intimacy is historical. Legally a basis may well be found in the fact that the State of Nevada acquired a large part, if not all, of its territory from California, (See organic law of Nevada, Act of March 2, 1861) and from the further point that the procedural laws and practically the entire body of all its laws were adopted from the State of California.

The rule as to the adoption of the judicial construction of laws imported from another state, given to them by the courts of the state from which they were taken, is of course, well established.

Williams v. Glasgow 1 Nev. 533.

In adopting the Practice Act of California, it must be presumed to have been adopted as interpreted by the highest court of judicature of that State.

In *Whitmore v. Shiverick*, 3 Nev. 289, it was contended by appellant that the statute does not require a statement on appeal to be served on the opposite side. But the court speaking through Beatty, C. J. held the contrary.

“Our practice act was copied almost *verbatim* from the California practice act as it stood at the time ours was enacted. Under the California Code of practice, the Supreme Court of that State had almost uniformly refused to review the facts of a case unless there had been a regular statement and motion for a new trial.” (Citing Cal. cases.) p. 303.

Weil v. Howard, 4 Nev. 393;

McLane v. Abrams, 2 Nev. 206;

State v. Parkinson, 5 Nev. 24;

Hess v. Pegg, 7 Nev. 27;

State v. Rokey, 8 Nev. 320;

Robinson v. Belt, 187 U. S. 48;

Gossage v. Crown Point, 14 Nev. 157.

In this case the Supreme Court of Nevada in construing a Nevada statute which was identical with a statute of California and also of Michigan, shows a strong leaning towards the decisions of the California courts.

The Michigan Supreme Court had construed the statute prior to its adoption by Nevada, and the California Supreme Court afterwards, (p. 156), and the decisions were in conflict. Nevertheless the Supreme Court of Nevada says:

“But in deciding the question involved in this case, we propose to give to the decisions of California equal weight and equal consideration, and determine for ourselves which view of the case is best sustained upon reason or sanctioned by the authority of analogous cases” (p. 158).

From this it is obvious that subsequent decisions of the highest court in California are deemed by the courts of Nevada as at least strongly persuasive of the construction to be given a law adopted from that state, and of the general tendency of the Nevada courts, when without precedents of their own, to look to the guidance of California authorities.

And the rules of evidence prescribed by the laws of a State are rules of decision for the United States courts while sitting within the limits of such state.

Ryan v. Bindley, 1 Wall. 66.

DEFUNCT PLEADINGS FOR WHICH OTHER AND AMENDED PLEADINGS HAVE BEEN SUBSTITUTED ARE NOT ADMISSIBLE TO PROVE ADMISSIONS.

This rule has been so thoroughly established in California as to admit of no controversy.

Mecham v. McKay, 37 Cal. 154-165 (decided in 1869).

“But we think the Court erred in admitting in evidence, against the objections of the defendants, the original answers filed by them in this action, and which had been superseded by the amended answers. The original answers were offered in evidence by the plaintiff as an admission by the defendants of their possession and occupation of the room in contest. Whilst it is true that pleadings in a cause containing admissions of facts dispense with the necessity of proving the facts admitted, the rule applies only to the subsisting pleadings on which the cause is tried, and not to defunct pleadings, for which other and amended plead-

ings have been substituted. It has doubtless often happened that a pleading contains admissions made under a misapprehension of the facts. In such cases, if the party amends his pleading, stating the facts differently, he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading. It cannot be a sound rule of evidence which works such results and practically puts it out of the power of a party to avoid the effect of a mistake in the original pleading.

The pleading on which a party goes to trial is the one on which he places his defense or cause of action, and he is bound by its admissions. But in many cases it would operate as a gross injustice to hold him to be bound by the admissions of a former pleading, made, perhaps, under a mistake of the facts, and which has become *functus officio* by the substitution of an amended pleading.

We are aware that the reverse of this proposition was announced by this Court in *Carpentier v. Small*, decided at the October Term, 1866; but a rehearing was granted in that cause, and the point was not discussed in the last opinion (35 Cal. 346)."

Ponce v. McElvy, 51 Cal. 222.

Reversed because of admission of original complaint as evidence, on authority of *Mecham v. McKay*, *supra*.

Osmont v. McElrath, 68 Cal. 466;

Wheeler v. West, 71 Cal. 126.

Reversed on authority of *Mecham v. McKay* and *Ponce v. McElvy*, *supra*.

Stern v. Lowenthal, 77 Cal 340;

Miles v. Woodward, 115 Cal. 308-316.

Reversed following *Mecham v. McKay*, supra, and *Ralphs v. Hensler*, 114 Cal. 196.

Ralphs v. Hensler, 114 Cal. 196.

“The principal contention upon this appeal is, that at the time when the judgment was rendered there was no evidence before the court of a ratification; that the pleading in which acts constituting a ratification had been set up by defendant, and which pleading amounted to a binding admission against her, was no longer subsisting and operative; that it had been superseded for all purposes by the amended answer which was before the court when the cause was determined; that the record discloses that the pleading containing the admissions was never introduced in evidence; that it was merely exhibited to the court, and that, if introduced in evidence, when the pleadings were changed and the admission withdrawn, it ceased to be evidence in the case, and could not, therefore, have been properly considered by the judge.

This contention of appellant must be sustained. It was early held in the case of *Mecham v. McKay*, 37 Cal. 154, that an original pleading containing an admission against interest, which original pleading had been superseded by an amended pleading, could not be admitted in evidence against the pleader, and it was said: ‘If the party amends his pleading stating the facts differently he would reap no benefit from his amendment, if the adverse party were at liberty to use the first pleading as an admission to overthrow the amended pleading.’ This case has frequently been followed. (*Ponce v. McElvy*, 51 Cal. 22; *Pfister v. Wade*, 69 Cal. 133; *Wheeler v. West*, 71 Cal. 126.) Under the rule as thus laid down defendants’ answer containing the admissions amounting to a ratification

was superseded and ceased to be a subsisting pleading. Its declarations could not have been received or considered by the court. But in the absence of those declarations there is not other evidence in the case tending to show ratification, nor is it even contended by respondent's attorney that the power of attorney executed by Mrs. Hensler to McCarthy contains sufficient authority for the execution in Mrs. Hensler's name of the note and mortgage in suit.

It follows that the judgment and order must be reversed and the cause remanded, and it is ordered accordingly."

These cases are not to be confused with those which hold that a pleading filed by one of the parties in another action may be used in evidence to show material admissions.

Such cases are

Duff v. Duff, 71 Cal. 531, 521;

Kamm v. Bank of California, 74 Cal. 191;

Coward v. Clanton, 79 Cal. 23.

They are also clearly distinguishable from those cases which hold that superseded pleadings may be used on cross-examination to impeach a witness under C. C. P. Sec. 2052.

Johnson v. Powers, 65 Cal. 179;

In re O'Connor, 118 Cal. 69.

We find one California case which holds such a pleading admissible to prove independent facts such

as the date of the pleading, the contents of a lost document of which it contained a copy, or an offer to pay money into court. This case, however, expressly affirms the rule for which we contend.

“Plaintiffs in their second amended complaint averred that they were and always had been ready and willing to pay over to the parties entitled thereto the amount due upon the wheat, and offered to pay the money into court.

At the trial, plaintiffs, for the purpose of showing their offer to fulfill the contract, by paying the money into court, offered in evidence the original complaint, filed January 25, 1878, which contained such offer, and which for that purpose was admitted.

There can be no question but that an amended complaint takes the place of the original, and then when filed the original ceases to perform any further functions as a pleading. (*Barber v. Reynolds*, 33 Cal. 497; *Kelly v. McKibben*, 54 Cal. 192.)

And although a party is bound by the admissions in his pleadings, yet it is only by the admissions in the pleadings upon which he goes to trial, and not by those in pleadings which have been superseded, that he is bound. (*Mecham v. McKay*, 37 Cal. 154; *Ponce v. McElvy*, 51 Cal. 222; *Kentfield v. Hayes*, 57 Cal. 409.)

It would work rank injustice to hold a party bound by statements or admissions in a pleading, which had been amended, for the very reason that they were inserted by inadvertence or mistake, and yet the rule which would admit it in evidence would have just this effect.

To permit it to be introduced generally as evidence in favor of the party by whom it was

filed, would be to permit a party to manufacture testimony in his own behalf.

While the general rule excludes all pleadings which have been superseded by others, it does not follow that an original pleading thus superseded may not be admissible in evidence in support of some independent fact connected with the case.

Whenever the date at which a pleading was filed becomes important, it may be introduced as evidence of that fact, although a later pleading has taken its place.

So, too, if a pleading contains a copy of an instrument, the original of which is afterward lost, the fact that it is embodied in a pleading, and the further fact that such pleading has been superseded by another, does not prevent the copy from being introduced in evidence upon proof of its authenticity, just as though it was a separate instrument.

In other words, it is in a proper case admissible in evidence, not because it is found in the pleading, but as a fact proper to be admitted.

In the present case, had the plaintiff served a written notice of their offer to pay the money into court, upon defendant Bliss, the notice would have been proper evidence, and the circumstance of the offer having been contained in a pleading did not alter its admissibility.

This was followed by proof that the money was actually paid into court, and that it still remains there, subject to the final disposition of the case. Under the pleading we are of opinion all this evidence was proper."

Pfister v. Wade, 69 Cal. 138, 139.

DISTINCTION BETWEEN SWORN STATEMENTS OF AN AFFIRMATIVE CHARACTER AND MERE ADMISSIONS IN VERIFIED PLEADINGS.

Some of the cases make a distinction between unverified pleadings or pleadings verified by an attorney and pleadings verified by the party himself. In other words the admissibility of the defunct pleading is based upon the fact that it is sworn to by the party himself.

In *Smith v. Davidson*, 41 Fed. 172 the Circuit Court reversed the trial court because the original answer verified by one of the attorneys for the defendant was admitted in evidence as an admission by the defendant of the facts therein stated.

See note to *Arkansas City v. Payne*, 18 Ann. Cas. 83; *Barrett v. Featherstone*, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245.

In the case now before the court there was, it is true, in the answer to the original complaint an express admission of the matters and things in the third paragraph of plaintiff's complaint contained.

But there was no allegation that those matters and things or any of them were true—in other words plaintiff in error never stated under oath or otherwise that they or any of them were true.

A mere admission in an answer is obviously not an averment or a statement of fact, and it does not seem clear how any greater or other effect can be given to it than to the admission which the law implies from a failure to answer an allegation. But

it will scarcely be contended that had the third paragraph of the complaint gone unanswered, the pleading of the plaintiff in error could have been introduced to prove the facts which she failed to deny.

Pleadings have been defined to be

“ ‘The statement, of the parties, in legal and proper manner, of the causes of action and grounds of defense * * * They were formerly made by the parties or their counsel, orally, in open Court, under the control of the Court.’ In other words, pleadings are but the statements of the issues to be tried.”

Bowman v. McLaughlin, 45 Miss. 461, 489.

(Quoting Bouvier Law Dictionary.)

31 Cyc. 43.

The function of pleadings is of course merely to make up and present to the court the formal issues upon which the parties to the litigation elect to stand at the trial of the case.

It may very well be that the attorneys for the plaintiff in error in this case considered that their defense to the original complaint was so strong in other respects as not to necessitate putting in issue the question of the ownership of the automobile or of the employment of its driver, and that such was the case, in the view of defendant in error at least, is evident from the fact that he did in fact amend his complaint. Then for the first time plaintiff in error, or her attorneys, found it necessary to put these matters in issue.

It would be quite as unjust to hold the plaintiff in error to the admissions, wholly judicial in character be it said, made upon the answer to the original complaint as it would to hold a party to the admissions or averments made in one of two inconsistent pleas upon the trial of the other. That the latter cannot be done is well settled.

Glenn v. Summer, 132 U. S. 157, 33 L. Ed. 301.

THE RULE IN OTHER JURISDICTIONS PERMITTING THE ADMISSION OF A DEFUNCT PLEADING APPLIES ONLY TO PLEADINGS WHICH ARE VOLUNTARILY ABANDONED.

This principle is illustrated by the instance where a party is required to elect between two pleadings or defenses or where a pleading is stricken out by order of court. In such cases the statements contained therein cannot be used in evidence as admissions.

Lane v. Bryant, 100 Ky. 138, 36 L. R. A. 709;

Dunson v. Nacodoches County, 15 Tex. Cir.

App. 9.

16 Cyc. 972 and cases there cited.

The present case, it will be noted, is not a case in which the plaintiff in error voluntarily amended her own answer. Her answer was rendered nugatory by the act of the defendant in error in amending his complaint. Hence we submit that the original answer was improperly admitted, even under the rule which obtains in other jurisdictions.

CASES CITED BY TRIAL JUDGE IN SUPPORT OF ADMISSIBILITY
OF DEFUNCT PLEADING.

The learned trial judge in the opinion handed down by him on motion for new trial cites eight cases in support of his ruling (Trans. 304). We shall briefly refer to them.

One of these cases, *In re O'Connor's Estate*, 118 Cal. 69, has already been discussed by the writer. It does not bear upon the point to which it is cited. It holds, merely,

“that the fact of the pleading being superseded by another furnished no valid ground for rejecting the admissions therein contained *when offered for impeachment purposes*” (71).

Of the remaining cases four have reference to the admissibility of original *petitions*, which of course, set up in the form of affirmative statements the facts for the proof of which they were offered in evidence.

These cases are:—

Arnd v. Aylesworth, *supra*;

Watt v. Missouri, K. & T. Ry. Co., *supra*;

Reemsnyder v. Reemsnyder, *supra*;

Meek v. Deal, *supra*.

But, as we have already attempted to show, a sworn statement of an affirmative character is quite a different thing from an admission of certain allegations contained in a pleading.

This leaves but three of the cases cited by the learned District Judge.

Kilpatrick-Koch Dry Goods Co. v. Box, 45 Pac. 629.

This is a Utah case, decided in 1896, upon the authority of a former Utah case without any general consideration of the authorities, and, moreover, falls within one of the exceptions to the rule above discussed, said to obtain in certain other jurisdictions, in that the amendment was voluntary upon the part of the defendant and not forced upon him by the plaintiff through an amended complaint.

Johnson v. Sheridan Lumber Co., 93 Pac. 470 is an Oregon case, decided in 1908, and the original answer, which was verified, by the secretary of the defendant corporation, not only appears to have been superseded by a voluntary amended answer, but it directly denied certain allegations of the complaint and made other affirmative allegations of fact which bring it within the same class of cases as *Arnd v. Aylesworth* and the companion cases above cited in which original petitions were admitted after amendment.

Scoville v. Brock, 118 Am. St. Rep. 975, the only remaining case cited by the learned District Judge was a Vermont case, decided in 1907. In that case the plaintiff filed a bill which was held insufficient on demurrer, and two several amendments thereto were afterwards filed. The defendant then answered the bill and the amendments, "waiving the answer to the original bill."

The court's discussion seems to turn upon the question whether a bill to which a demurrer has been sustained is out of court to such an extent that it cannot be reinstated by an amendment and it is not clear that there were any admissions in the answer which were admitted or, if so, what was the form of the admissions. The remarks of the court as to the admissibility in evidence of an original answer may fairly be regarded as *dicta*.

It is submitted that the learned trial judge erred in admitting the original answer and that the judgment should be reversed.

Dated, San Francisco,

September 25, 1922.

Respectfully submitted,

W. F. WILLIAMSON,

B. M. AIKINS,

Attorneys for Plaintiff in Error.

No. 3855

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error,

VS.

J. B. DANIEL,
Defendant in Error.

Brief for Defendant In Error

FILED

OCT 10 1922

F. D. MONCKTON,
CLERK

BOOTH B. GOODMAN,

Attorney for Defendant in Error.

No. 3855

IN THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

MILLIE L. EVANS, now MILLIE L. JONES,
Plaintiff in Error.

VS.

J. B. DANIEL,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

The question of whether or not abandoned pleadings are admissible in evidence is a **question of evidence and not of practice**. It is not governed by any section of the Nevada Civil Practice Act but is simply a question of law to be settled by the rules flowing from the common law as construed and accepted by the Courts of America. Consequently any argument that Nevada is bound by California decisions because of some similarities in the Civil Practice Act is beside the question and not in point.

“The overwhelming weight of authority is to the effect that a pleading which has been superseded in an action by an amended pleading is admissible in evidence against the pleader”

H. C. BEHRENS LUMBER COMPANY v LAGER et, al, and note.
Ann. Cas. 1913 A 1128.

(Approximately 50 cases from 21 different states are cited in the note supporting the rule as stated.)

In Ruling Case Law Vol. 1, page 497, the rule is stated as follows:

“According to established practice in most jurisdictions a pleading is admissible against the pleader to establish facts alleged therein notwithstanding it has been superseded by an amended pleading. And this is true whether the pleading is verified or not.”

Jones on the Law of Evidence (1896 Ed.) Vol. 1 Sec. 274, says:

“Such written statements (pleadings) are admissible on the same principle as oral admissions, hence it is not necessary that the parties should be the same and

the pleadings of a party may be received against him **in a subsequent suit although the parties are different.**"

In Section 275 of the same work Mr. Jones says:

"On the same principle where **amended pleadings** have been filed allegations in the original pleadings have been still held admissible but in such case the original pleadings can have no effect, unless formally offered in evidence."

This matter is the subject of a 70 page note in 14 A. L. R. page 23, where the matter is fully treated and the contentions of the defendant in error upheld. The authors of said note in concluding say:

"Generally, the rules of evidence apply to pleadings containing admissions against interest in the same manner in which they apply to evidence generally. Indeed, the question of the admissibility of such pleadings is largely one of the application of the ordinary principles of evidence. Much of the seeming difficulty of the subject and many of the differences between the courts may be eradicated by the constant and consistent application

of evidence rules to the situation in question."

In the case at bar the Plaintiff in Error sought in her answer to the amended complaint to set up an affirmative defense and alleged that the ranch and property in question was at the time of the accident under a verbal lease to her mother, Elizabeth A. Rodgers. (Tr. p. 32.) This verbal lease was supposed to cover ten thousand acres of ranch lands besides personal property. (Deposition of Millie L. Evans Tr. 185 Sixth interrogatory and answer Tr. p. 188.) This unusual arrangement alleged to exist between mother and daughter, Defendant in Error was required to meet. How could he meet it excepting by admissions? If an admission is not competent evidence under such circumstances it is difficult to conceive a set of circumstances where an admission would be. If any other evidence existed it was in the exclusive possession of the Plaintiff in Error and her mother Mrs. Elizabeth A. Rodgers. The answer containing the admission was verified by the Plaintiff in Error personally. (Tr. p. 24.) The ownership of the property and automobile was never denied by the Plaintiff in Error in either answer. The ownership, with the admission in the original answer, was sufficient to estab-

lish the link of proof, and we submit that the Court did not commit error in admitting in evidence the original pleadings containing the admission under oath by the Plaintiff in Error of facts particularly within her knowledge and within her knowledge exclusively. To rule otherwise would be to put a premium upon deception. The original answer of the Plaintiff in Error was voluntarily abandoned, as appears from the stipulation at page 251 of the Transcript.

We submit that no error appears and that the judgment should be affirmed.

Dated at Lovelock, Nevada, October 2nd, 1922.

Respectfully submitted,

BOOTH B. GOODMAN,
Attorney for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TITLE INSURANCE AND TRUST COMPANY, a
corporation, SECURITY TRUST AND SAV-
INGS BANK, a corporation, HARRY CHAND-
LER, O. P. BRANT, M. H. SHERMAN and
E. P. CLARK,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
~~Southern~~ Division.

Northern

FILED

APR 3 - 1922

F. D. MONCKTON,
CLERK

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TITLE INSURANCE AND TRUST COMPANY, a
corporation, SECURITY TRUST AND SAV-
INGS BANK, a corporation, HARRY CHAND-
LER, O. P. BRANT, M. H. SHERMAN and
E. P. CLARK,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
~~Southern~~ Division.
Northern

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Assignment of Errors.....	34
Bill of Complaint	4
Citation	2
Clerk's Certificate to Judgment Roll.....	31
Motion to Dismiss.....	27
Names and Addresses of Attorneys.....	1
Order Allowing Appeal.....	39
Order Sustaining the motion to Dismiss.....	28
Petition for Appeal.....	32
Præcipe	41
Summons	24

Names and Addresses of Attorneys.

For Plaintiff and Appellant:

JOSEPH C. BURKE, Esq., United States District Attorney, and

GEORGE A. H. FRASER, Esq., Special Assistant to the Attorney General, Federal Building, Los Angeles, Calif.

For Defendants and Appellees:

O'MELVENY, MILLIKIN & TULLER, Title Insurance Building, Los Angeles, Calif.

United States of America, ss.

To TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK, Defendants, and to O'MELVENY, MILLIKIN & TULLER, their Attorneys,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 7th day of April A. D. 1922, pursuant to Order allowing Appeal entered March 10, 1922, and on file in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain case wherein The United States of America is Plaintiff and Appellant and you are Defendants and Appellees to show cause, if any there be, why the Decree of said Court made and entered the 6th day of October, 1921, dismissing Plaintiff's Bill of Complaint in the said Order allowing Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Oscar A. Trippet,
United States District Judge for the Southern
District of California, this 10th day of March,

A. D. 1922, and of the Independence of the
United States, the one hundred and forty-sixth.
Trippet.

U. S. District Judge for the Southern District of
California.

[Endorsed]: B 68 Nor. Div. *In the United States*
Circuit Court of Appeals *for the* NINTH CIRCUIT
THE UNITED STATES OF AMERICA, Appellant,
vs. TITLE INSURANCE AND TRUST COM-
PANY, a corporation, SECURITY TRUST AND
SAVINGS BANK, a corporation, HARRY CHAN-
DLER, O. P. BRANT, M. H. SHERMAN and E. P.
CLARK, Appellees. Citation Service of the within Ci-
tation is hereby accepted on behalf of Defendants and
Appellees within named, at Los Angeles, California,
this 10 day of March, 1922. O'Melveny Millikin &
Tuller, Attorneys for Defendants and Appellees.
FILED MAR 11 1922 CHAS. N. WILLIAMS,
Clerk *By* Edmund L Smith *Deputy Clerk* Eq. R. Bk.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, NORTH-ERN DIVISION.)	IN THE DIS-TRICT COURT SS. NO. B-68 IN EQUITY.
--	---	--

THE UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK,	)	BILL OF COMPLAINT.
)	
)	
Defendants.)	

COMES NOW the plaintiff above named, by its attorneys, and complaining of defendants alleges and says:

I.

This suit is brought under the authority and by the direction of the Attorney General of the United States at the request of the Secretary of the Interior, and is brought by plaintiff in furtherance of its Indian policy and also in its capacity, and to discharge its obligations, as guardian for sundry Indians known as the Tejon band or tribe of Indians now and from time immemorial residing on certain premises hereinafter described,

in what is now Kern County, California; that said Indians are and from time immemorial have been tribal Indians, and at all times since July 7, 1846, have been and now are wards of the United States and at all times herein mentioned were and still are incompetent to manage their own affairs; that at all of said times they were and still are what are commonly called Mission Indians.

II.

That defendant Title Insurance & Trust Company is a corporation organized and existing under and by virtue of the laws of the State of California, and that its principal office and principal place of business are in the City of Los Angeles, in said State;

That defendant Security Trust and Savings Bank is a corporation organized and existing under and by virtue of the laws of the State of California, and that its principal office and principal place of business are in the City of Los Angeles, in said State;

That defendants Harry Chandler, O. P. Brant, M. H. Sherman and E. P. Clark are citizens and residents of the State of California, and of the Southern judicial district thereof.

III.

That the jurisdiction of the Court in this suit depends upon the fact that the United States of America is plaintiff herein.

IV.

That defendant Title Insurance and Trust Company is and ever since September 19, 1916, has been

the owner in fee and, except as hereinafter set forth, is and ever since said date has been by itself or through the other defendants above named, in possession and control of the following described premises situate in Kern County, California, to-wit: Starting from corner No. 8 of El Tejon ranch, as found and established in the resurvey thereof of October, 1880, on file in the office of the United States Surveyor General, San Francisco, California, South $84^{\circ} 21'$ East 340.10 chains (22,448 ft.) to corner No. 9; thence North $22^{\circ} 45'$ East 53.52 chains (3,532 ft.) to corner No. 10; thence North $56^{\circ} 0'$ West 229.98 chains (15,180 ft.) to corner No. 11; thence North $43^{\circ} 15'$ West 93.27 chains (6,153 ft.) to the intersection of the ranch line of said ranch with the township line between Township 11 North and Township 12 North, Range 17 West, San Bernardino Base and Meridian; thence South $26^{\circ} 0'$ West 237 chains (15,632 ft.) to point of beginning, situate in Sections 18 and 19, Township 11 North, Range 16 West, and Sections 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 24, Township 11 North, Range 17 West, San Bernardino Base and Meridian, containing 5364 acres more or less, together with full rights in and to the waters of Tejon Creek and Cedar Creek which flow through said premises and the right to use on and in connection with said premises for irrigation of the irrigable lands thereof and for watering stock and for domestic purposes at all times throughout the year seven cubic feet of water

per second of time with a priority of immemorial antiquity, the same being the first right and priority in said streams and each of them; that said premises form part of what is known as Rancho El Tejon.

That defendant Security Trust & Savings Bank is trustee under and by virtue of a certain deed of trust made and executed as of May 1, 1916, wherein and whereby El Tejon Ranchos, Inc., a corporation, then owner in fee of the premises last above described and other property, conveyed to said Security Trust & Savings Bank said premises and other property in trust to secure the payment of 1000 notes of \$1,000 each, dated May 1, 1916 and due May 1, 1926, made and executed or to be made and executed by said El Tejon Ranchos, Inc., or any of such notes at any time issued, all on sundry terms and conditions and under divers uses and trusts as in said deed of trust set forth, which said deed of trust is recorded in Book 315, page 132, of the records of Kern County, and in Book 6304, page 262, of the records of Los Angeles County, California, and is still outstanding and unreleased.

Plaintiff is informed and believes and on such information and belief avers, that defendants Harry Chandler, O. P. Brant, M. H. Sherman and E. P. Clark, and each of them, claim some right, title, interest or estate in and to the premises in this paragraph specifically described, but the precise nature and extent of such claim, right, title, interest or estate is to plaintiff unknown; nor has plaintiff, by the exer-

cise of diligence, been able to ascertain the same, except that plaintiff on information and belief avers that said last named defendants are and for a long time past have been in possession and control of said premises, either by and through themselves and their agents or conjointly with defendant Title Insurance & Trust Company, and either under some individual claim of right or under some right or claim of right derived from defendant Title Insurance & Trust Company, the owner of the fee title, but the facts in this regard are to plaintiff unknown, nor has plaintiff by the exercise of diligence been able to discover them. But plaintiff avers that each and every right, title, interest, claim or demand of any or all of the defendants herein, in or to said premises in this paragraph described, is subject to a right of occupancy, use and possession of the whole of said premises, including water rights as above described, vested in said band or tribe of Tejon Indians, and to actual possession by said band or tribe of a portion of said premises and water rights as hereinafter more particularly set forth.

V.

That in and prior to the year 1843 said premises above described were within and subject to the sovereignty and jurisdiction of the Republic of Mexico and were part of the ungranted lands of that republic; that, however, from time immemorial prior to said year and during the entire period of Spanish and Mexican sovereignty over the territory now em-

braced within the State of California, said premises, and as well a much larger tract of which said premises were and are a part, were inhabited by the tribe known to the Spaniards and Mexicans as Tejon Indians; that said Tejon Indians were and are the ancestors and predecessors of the existing band or tribe of that name; that up to the years 1843 and 1845, and for a long time thereafter, as hereinafter set forth, said Tejon Indians resided upon and exclusively possessed, used and cultivated said premises above described, and as well said larger tract, raising crops and pasturing cattle, horses and other stock thereon, gathering the natural products of the soil thereof and residing thereon in permanent dwellings; that said Tejon Indians at all times herein mentioned were and now are agricultural, pastoral, sedentary and peaceful Indians; that up to said years 1843 and 1845 not only was said use and possession of said Indians exclusive, peaceful, open, notorious, adverse and undisturbed, but no claim, title or right to said premises or said larger tract, or any portion of either, was made or asserted by any other person or persons whomsoever except the general sovereignty claimed by the Kingdom of Spain or the Republic of Mexico over the same.

That from the time of the establishment of the Catholic Missions in what is now the State of California, said Tejon Indians were and still are under the spiritual jurisdiction of the Catholic church; that

they were instructed in Christianity and in the arts of civilization by the Mission Fathers; and that a church was built for them on said premises, in which services were and still are from time to time held.

That under and by virtue of the laws both of Spain and of Mexico said Tejon Indians were entitled to the continuous and undisturbed occupancy, possession and use of said premises, as well as of the larger tract then occupied by them, as being land needed by them for habitation, tillage and pasture, and as including trees and bushes for natural food products, wood for fuel and said water right for irrigation and domestic purposes; and that the use, occupancy and possession of the Tejon Indians as above set forth was had and exercised by them and they were protected in the same under and by virtue of said laws of Spain and Mexico, which said laws governed and remained in force over all the land herein described or referred to up to the time of the acquisition by the United States from Mexico of the territory now included within the State of California.

VI.

That on or about May 30, 1843, Jose Antonio Aguirre and Ignacio del Valle, both Mexican citizens, petitioned the Mexican Governor of California for a grant from the government of Mexico in accord with the laws of said republic, of a tract of land known as Tejon; and thereafter such proceedings were had that on or about November 24, 1843, said Governor

made and executed a grant of land to said petitioners, including the premises above described and other territory, aggregating about 98,000 acres. That said grant was made upon and subject to the following condition, among others, to-wit: "2d. No impediran el cultivo y demas beneficios que han disfrutado siempre los indios que se hallan establecidos en dho parage." which being interpreted, is:

"They must not prevent (interfere with) the cultivation and other advantages which the Indians who are found established in said place have always enjoyed."

which said grant, embodying said condition, was approved by the Departmental Assembly and delivered to said grantees on or about June 30, 1845; that said grant included the premises above described along with other territory.

VII.

That thereafter and on or about July 7, 1846, the United States succeeded the Republic of Mexico in the sovereignty of and over the territory now included in the State of California including the tract embraced in said grant; that thereafter and within the time provided by law, said grantees presented said claim for confirmation to the Board of Commissioners appointed under the Act of Congress of March 3, 1851 (9 Stat. L. 631) to ascertain and settle private land claims in California, and that thereafter such proceedings were had before and by said Board that on or about May 8, 1855 said grant was by said

Board confirmed; that in its opinion confirming said grant, said Board used the following language: "It is proper to remark in reference to this grant that it contains a reservation of such lands as may be necessary for a military establishment * * * There is also a provision requiring the grantees not to 'prevent the cultivation and other benefits that the Indians may have established in said place.' This restriction we have heretofore decided does not affect the right of property, though it may create a use in favor of the Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal."

That an appeal was taken from the decree or decision of said Board confirming said grant to the District Court of the United States for the Southern District of California, which said Court on, to-wit, March 18, 1858, affirmed said decree or decision; that a further appeal was taken from said last named decision to the Supreme Court of the United States, which said Court on the first Monday of December, 1859, dismissed said appeal, whereby the decree or decision affirming said grant became final.

VIII.

That thereafter such proceedings were had that on, to-wit, May 9, 1863, a United States land patent was issued in due form, conveying to said Aguirre and del Valle a tract of land in said patent described em-

bracing the premises hereinbefore described and other territory, which said patent in the granting clause thereof contained the following language; "But with the stipulation that in virtue of the 15th Section of the said Act (March 3, 1851) the confirmation of this claim and this patent 'shall not affect the interests of third persons.' "

That thereafter by divers mesne conveyances the fee title to said land passed from said grantees to Title Insurance and Trust Company, defendant herein, which became the owner of said title thereto on or about September 9, 1916, and still owns and holds the same; that the right, title, interest, claim and demand of each of defendants herein, in and to said premises, is, so far as known to plaintiff, hereinabove and in Paragraph IV of this complaint set forth; that the same is subject, however, to the right of occupancy, possession and use of said premises by the Tejon Indians as hereinabove and hereinafter set forth, and except as to the actual occupancy, possession and use of said Indians of portions of said premises as hereinafter shown.

IX.

That under and by virtue of the laws, usages and customs of Spain and Mexico, the terms of the Mexican grant aforesaid and of its confirmation, the patent aforesaid, the treaty of Guadalupe Hidalgo, whereby the United States acquired from Mexico the territory now comprising the State of California, the

laws of the United States and the law of nations, said tribe or band of Tejon Indians became, were and are entitled to the full, undisturbed and continuous occupancy, possession and use of the premises hereinabove described as hereinbefore more fully set forth, unless and until the said Indian title should be extinguished by this plaintiff; that this plaintiff has never extinguished, modified or diminished said title; that said Indians maintained and enjoyed their said right of possession and use of said premises as a tribe openly, notoriously, continuously, peaceably, exclusively and without molestation for a long time after said grant of 1843, confirmed in 1845, as aforesaid, but that beginning about the year 1888, or earlier, the exact date on account of the remoteness of the facts described and the lack of authentic records being unknown to this plaintiff, the grantees of said Aguirre and del Valle, being the predecessors in title and interest of defendants herein, commenced gradually to drive and exclude said band or tribe from the outer limits of the premises above described by unlawfully and forcibly prohibiting and preventing said Indians from using the same for pasture or residence, and by themselves using the same at their discretion for cattle range or agriculture, by discouraging the residence of said Indians thereon, and by pulling down or otherwise destroying the houses of said Indians thereon and destroying their crops and other improvements, and in these and other ways gradually drove and forced back said Indians and

narrowed and restricted the limits of the land actually occupied by them; that defendants when they acquired fee title to or took possession of said premises as aforesaid, in disregard and violation of said Indian right of occupancy, possession and use, forcibly and unlawfully retained possession of and appropriated and devoted to their own use all portions of the above described premises from which said Indians had been driven, as aforesaid, and ever since have used and enjoyed and still use and enjoy the same, and continue to exclude and threaten to perpetually exclude said Indians therefrom; that defendants from the time when they acquired fee title to and general possession of said premises continued for their own benefit and advantage further to extend the policy of repression and exclusion, and with full notice and knowledge of said Indian title, and forcibly and unlawfully and in disregard and defiance of the said title have, by themselves and their agents, still further driven out and driven back said Indians and have restricted their use and occupancy of said premises and made it impossible for said Indians to occupy, possess or use the greater portion of said premises at all, or any portion thereof peaceably and securely, and still continue and threaten to continue said acts and policy until said Indians are entirely driven and expelled from every portion of said premises; that these defendants in pursuance of said course have refused and still refuse to permit said Indians, or any of them to acquire or own so much as a single

head of cattle to furnish milk for their children; that they have refused and still refuse to permit them, or any of them, to own horses except in so far as the same are useful on the said ranch on which some of the Indians are employed as laborers; that they have interfered with the proper and beneficial use for irrigation, by said Indians, of the waters of the creeks flowing through said premises; that they have refused and still refuse to allow said Indians to improve or repair their huts even when said Indians had obtained and had upon the premises materials for that purpose; that they have entered upon, fenced in and used, and still use for their own purposes, land once cultivated by the Indians and needed by them for their subsistence; that when members of said band died or were driven out by defendants, by the measures above described, or otherwise, defendants have immediately pulled down their houses, destroyed their improvements and turned their gardens and cultivated grounds into cattle range and threaten to continue so to do; that they have by duress and threats of eviction forced many of said Indians employed upon said ranch to submit to a deduction from their wages of a sum alleged to represent rental for the premises occupied by them, and have brought suits in ejectment against such Indians as refused to submit to such deduction or to pay said alleged rental; that the aforesaid matters and things have been done forcibly, unlawfully and by *vis major*, and that by these and other acts of wrong and oppression the

Indians have been gradually driven off said ranch so that the numbers of those occupying the premises hereinabove described, or any portion thereof, have been reduced from about 300 to about 80, and so that the acreage actually occupied by them has been reduced from about 5364 acres to about 65 acres, which said 65 acres are still possessed, occupied, irrigated and cultivated by the remnants of said band; that unless restrained by this Court, defendants threaten to continue and will continue the policy and acts above described until all of said Indians are driven off said ranch and their occupancy, possession and use of said premises totally destroyed.

X.

That said Indian right of occupancy, use and possession of said premises above described includes the right to use the wagon roads over said ranch leading from the County roads to said premises and the use under a first right and priority in Tejon Creek and Cedar Creek of an adequate supply of water for irrigating such portions of the lands thereof as are irrigable; that from 600 to 900 acres of said premises were cultivated by said Indians as early as 1843 and continuously since, except as and until said area was restricted by the wrongful acts of defendants and their predecessors as above set forth; that of said premises from 300 to 350 acres are and always have been irrigable from the waters of Tejon Creek and Cedar Creek flowing through said premises and to

which said premises are riparian; and that an additional acreage is irrigable for early crops from the waters of said creeks; that said irrigable area was in the year 1843, and continuously since that time has been, irrigated by said Tejon Indians except as and when restricted by defendants and their predecessors, as above set forth, and that portions thereof are still irrigated by said Indians to the fullest extent to which defendants permit them to use of said water for such purpose; that of the flow of said two creeks seven cubic feet of water per second of time and water from other sources in addition is necessary for the ordinary irrigation of said irrigable area of from 300 to 350 acres.

That there is hereto attached, marked Exhibit "A" and made a part of this complaint, a colored map showing the premises above described, the land now cultivated by said Indians, the land formerly irrigated by them, the arable land within said premises, and the former and present irrigation ditches, with other details.

XI.

That in and by the Act of Congress of January 12, 1891, (26 Stat. L. 712) it was made and is the duty of the Attorney General at the request of the Secretary of the Interior, whenever the lands occupied by any band or village of Mission Indians are within the limits of a confirmed private grant, to defend the Indians in the rights secured to them in the original grant from the Mexican government and

by the Act of the State of California of April 22, 1850; that the Secretary of the Interior, through the Commissioner of Indian Affairs, has requested the Attorney General to institute this suit; that the rights of the Tejon Indians under the Mexican grant here involved are as hereinabove set forth; that said California Act of 1850 provides in effect, among other things, that persons and proprietors of land on which Indians are residing shall permit such Indians peaceably there to reside in pursuit of their usual avocations for the maintenance of themselves and their families; with further provisions whereby such proprietor may, by proceedings in Court, obtain the separation of sufficient land for the necessary wants of said Indians, including the site of their village or residence, if they so prefer it, specifically requiring that no such selection shall be made to the prejudice of such Indians and that they shall not be forced to abandon their home or village where they have long resided.

XII.

That by reason of the appropriation and use by defendants of portions of said premises from which said Indians were excluded by defendants' predecessors in title, and the continued exclusion of said Indians therefrom by defendants as above set forth, said Indians have been damaged in the sum of \$75,000.

That by reason of the further expulsion and exclusion of said Indians by defendants from other

portions of said premises, and the continued appropriation and use thereafter by defendants of such other portions as above set forth, said Indians have been damaged in the further sum of \$2,500.

That by reason of the molestation of said Indians by defendants and the restrictions and limitations placed by defendants on said Indians in the use and enjoyment of those portions of said premises still occupied by them as above set forth, said Indians have been damaged in the further sum of \$50,000.

WHEREFORE, plaintiff prays

1. That defendants be required to make full disclosure and discovery of the matters aforesaid, and especially as to the nature of the right, title, interest, estate, claim or demand of defendants Harry Chandler, O. P. Brant, M. H. Sherman and E. P. Clark in or to said premises or to the possession or control thereof, or any part thereof, according to the best of their knowledge and information, and full, true, direct and perfect answers make to the matters hereinbefore charged.

2. That the Indian title of occupancy, possession and use of and to the premises hereinabove described, including said described water rights, and said rights of way, and every part and portion thereof, be quieted in said Indians as against the fee title, and any and every title, possessory or otherwise, of defendants herein, and each and all of them; and decreed to be superior to and free from the lien of the deed of trust hereinbefore referred to; and that said Tejon Indians,

including all living members of said band heretofore driven or forced from said premises by defendants or their predecessors, and the descendants of any and all of said Indians be held, adjudged and decreed to have full and perpetual right and title to occupy, possess, use and enjoy said premises and all thereof, including the rights in the waters of said Tejon and Cedar creeks as above described, and all other waters to which said premises are riparian, and including all the natural products of said premises, whether by agriculture, horticulture, irrigation, cattle raising, or any other ordinary method of use, without interference, restriction or molestation of any sort, nature or description, by or from defendants herein or any of them, or any person or persons claiming under or through them or any of them, as long as any of said Indians or any of their children or descendants continue to occupy or dwell upon said premises; but without any right to sell, dispose of or encumber said title to said premises, or any part thereof, except to or in favor of or with the consent of the United States.

3. That in and by the final decree herein, defendants and each and all of them and all their heirs, executors, administrators, agents, representatives, successors and assigns, and any and all persons claiming under or through them, or any of them, be perpetually enjoined from interfering with said Indian use, occupation or possession of said premises or any part thereof, in any manner or by any means, direct or indirect, or from harassing, molesting or restrict-

ing said Indians in any manner, or by any means, direct or indirect, in the full exercise and enjoyment by them of said Indian title; and that in the meantime a preliminary injunction be issued preserving the status quo and enjoining and prohibiting any acts or interference with or molestation of said Indians, or any restriction or limitation of the use and occupancy now enjoyed by them, or the bringing of further prosecution of any suits or actions against them arising out of such use or occupancy, by defendants or their representatives or anyone claiming by or through them or any of them, until final decree.

4. That judgment be entered against defendants and in favor of plaintiff for the use and benefit of all of said Tejon Indians in the sum of \$127,500 as compensatory damages for the wrongful and illegal appropriation and use by defendants of portions of said premises from which said Indians had been excluded by defendants' predecessors in title, and for the continued exclusion of said Indians from said portions by defendants; and for the wrongful and illegal exclusion of said Indians from other portions of said premises by defendants and the continued use of said other portions by defendants as above set forth; and for the restriction by defendants of the use, possession and enjoyment by said Indians of the portion of said premises still actually held by them as aforesaid.

5. That plaintiff may have such other and further relief as to the Court may seem proper and that





defendants be decreed to pay all the costs of this proceeding.

Robert O'Connor

United States Attorney

Address:

Federal Bldg., Los Angeles, Cal.

John F. Truesdell,

230 Post Office Bldg. Denver, Colo.

George A. H. Fraser,

“ “ “ “ “

Special Assistants to
the Attorney General,
Attorneys for Plaintiff.

(MAP)

[Endorsed]: No. B68. Eq. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SO. DISTRICT *of* CALIFORNIA NORTHERN DIVISION. UNITED STATES OF AMERICAM Plaintiff, *vs.* TITLE INSURANCE and TRUST COMPANY, a Corporation, et al., Defendants. BILL OF COMPLAINT. FILED Dec 20 1920

CHAS. N. WILLIAMS, Clerk By R S Zimmerman
Deputy Clerk.

UNITED STATES OF AMERICA
District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION.

In Equity

The President of the United States of America,
Greeting!

To Title Insurance and Trust Company, a corporation, Security Trust and Savings Bank, a corporation, Harry Chandler, O. P. Brant, M. H. Sherman and E. P. Clark,

You Are Hereby Commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room in Fresno, California, on or before the twentieth day, excluding the day of service, after service of this subpoena upon you, to answer a Bill of Complaint exhibited against you in said Court by The United States of America, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

(Seal) Witness, *The Honorable OSCAR A. TRIPPET Judge of the District Court of the United States, this 20th day of December in the year of our*

Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

Chas. N. Williams, Clerk.

By R S Zimmerman Deputy Clerk

MEMORANDUM PURSUANT TO RULE 12,
OF RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES PROM-
ULGATED BY THE SUPREME COURT, NO-
VEMBER 4, 1912.

On or before the twentieth day after service of the subpoena, excluding the day thereof, the defendant is required to file his answer or other defense in the Clerk's Office; which (except when Court is in session and a Judge present at Fresno), is at Los Angeles, otherwise the Bill may be taken pro confesso.

Chas. N. Williams, Clerk.

By R S Zimmerman Deputy Clerk

To the Marshal of the United States for the Southern District of California:

Pursuant to Rule 12, the within subpoena is returnable into the Clerk's Office twenty days from the issuing thereof.

Subpoena Issued December 20th 1920

Chas. N. Williams, Clerk.

By R S Zimmerman Deputy Clerk.

Sou. District of Cal. ss.

I hereby certify and return, that on the 21st day of Dec. 1920 I received the within Subpoena and that

after diligent search, I am unable to find the within named defendants M. H. Sherman within my district.

C. T. Walton

United States Marshal.

By D. S. Bassett

Deputy United States Marshal.

UNITED STATES MARSHAL'S OFFICE }
SOUTHERN DISTRICT OF CALIFOR- } SS.
NIA }

I Hereby Certify, *that I received the within writ on the 21st. day of December, 1920, and personally served the same with Bill of Complaint on the 22nd. day of December, 1920, on Title Insurance & Trust Co. Security Trust & Savings Bank, Harry Chandler, O. F. Brant, & E. P. Clark by delivering to and leaving with W. B. Brown, Asst. Sec. J. F. Sattori, Pres. Harry Chandler, O. F. Brant and E. P. Clark said defendants named therein, personally, at the County of Los Angeles in said district, a copy thereof*

(Seal) *Los Angeles,*

C. T. WALTON,

U. S. Marshal.

Dec. 22nd, 1920.

By D S Bassett Deputy

[Endorsed]: *Marshal's Civil Docket No. 4156 No. B 68 Equity. U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA Northern Division. IN EQUITY The United States of America, vs. Title Insurance and Trust Company, a Corporation, SUBPOENA FILED FEB 7 1921 CHAS. N. WIL-*

LIAMS, Clerk *By* P. W. Kerr *Deputy Clerk* Eq. R.
Bk

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION.

THE UNITED STATES OF AMERICA,	Plaintiff	} MOTION TO DISMISS No. B 68 In Equity
- vs -		
TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK	Defendants.	

COME NOW Title Insurance and Trust Company, a corporation, Security Trust and Savings Bank, a corporation, Harry Chandler, O. P. Brant, M. H. Sherman and E. P. Clark, defendants herein, and jointly and severally move the court to dismiss the Bill of Complaint herein on the ground that the same does not state any matter of equity entitling plaintiff to relief prayed for, nor to any relief, nor are the facts stated sufficient to entitle plaintiff to any relief against these defendants, or any of them.

WHEREFORE, these defendants pray for judgment of this court whether they, or any of them, shall be required further to answer and further pray

that said Bill of Complaint be dismissed with costs of these defendants.

C. H. Brock

J. N. Hastings

O'Melveny Millikin & Tuller

Walter K. Tuller

Solicitors for defendants.

I, Walter K. Tuller, one of the solicitors for defendants in the above entitled action, do hereby certify that the foregoing motion, in my opinion, is well founded in law, and that the same is not made for purposes of delay.

Walter K. Tuller.

[Endorsed]: *No. B 68 In Equity IN THE United State District Court, IN AND FOR THE Southern District of California, Northern Division. THE UNITED STATES OF AMERICA Plaintiff, - vs - TITLE INSURANCE AND TRUST COMPANY, a corp, et al. Defendants. MOTION TO DISMISS. Received copy of the within Motion to Dismiss this 7" day of Jan. 1921 Robt. OConnor. F attorney for ptff. FILED JAN 7 1921 CHAS. N. WILLIAMS, Clerk, By R S Zimmerman Deputy Clerk O'MELVENY, MILLIKIN & TULLER SUITE 825 TITLE INSURANCE BLDG. N. E. corner Fifth & Spring Sts. Los Angeles, Cal. Attorneys for Defendants.*

At a stated term, to wit, the May A. D. 1921 Term of the District Court of the United States of Amer-

ica, within and for the Northern Division of the Southern District of California held at the court room thereof in the City of Los Angeles, California on Thursday the Sixth day of October in the year of our Lord one thousand nine hundred and twenty-one.

PRESENT: THE HONORABLE Oscar A. Trippet District Judge.

The United States of America,	}	
Plaintiff	|	
vs.	|	
Title Insurance and Trust Com-	}	No. B 68 Equity
pany a corporation, Security	|	
Trust and Savings Bank, a corpo-	|	
ration, Harry Chandler, O. P.	|	
Brant, M. H. Sherman and E. P.	|	
Clark	|	
Defendants	|	

This cause coming on at this time EX PARTE; Robert B Camarillo, Esq., appearing on behalf of the Government and——Esq. appearing on behalf of the defendants, and a final decree of dismissal having been presented to the court at this time and now, pursuant to a motion made by defendant's attorney as aforesaid, it is by the court ordered that said decree be signed, filed and entered, said plaintiff's attorney having excepted to the order granting motion to dismiss and to signing of decree. Said decree is as follows, to wit:

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA,
NORTHERN DIVISION

THE UNITED STATES OF }
AMERICA,

Plaintiff

vs

TITLE INSURANCE AND }
TRUST COMPANY, a corpo- }
ration, SECURITY TRUST }
AND SAVINGS BANK, a cor- }
poration, Harry Chandler, O. P. }
Brant, M. H. Sherman and E. P. }
Clark,

Defendants. }

No. B 68

In Equity

DECREE
DISMISSING
BILL OF
COMPLAINT.

This cause came on to be heard at this term on defendants' motion to dismiss the bill of complaint herein, and was argued by counsel. Thereupon, upon consideration thereof, it was ordered, adjudged and decreed, and IT IS NOW HEREBY ORDERED ADJUDGED, AND DECREED that said motion to dismiss be and the same is hereby granted, and that said bill of complaint be and the same is hereby dismissed and that plaintiff take nothing by this action and that defendants go hence without day.

The plaintiff elects to stand upon its bill of complaint and to said order and to this decree plaintiff takes exception and said exception is hereby allowed,

Dated at Los Angeles, California, the 6th day of October, 1921

Trippet Judge

Approved as to form as provided in Rule 45 (approved as to form, Robert B. Camarillo, Asst. U. S. Attorney) Decree entered and recorded, Oct 6 1921.

Chas. N. Williams Clerk

Louis J Somers Deputy.

Eq. JR 8/348

[Endorsed]: *No. B 68 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE Southern District of California Southern Division THE UNITED STATES OF AMERICA, Plaintiff, vs. TITLE INSURANCE & TRUST CO., a corporation, et al, Defendants DECREE DISMISSING BILL OF COMPLAINT FILED OCT 6 1921 Chas. N. Williams, Clerk Louis J. Somers Deputy*

WHEREUPON, said Bill of Complaint, Subpoena ad res. Motion to Dismiss, and Decree of Dismissal are hereto annexed; the said Motion to Dismiss being duly signed, filed and enrolled pursuant to the practice of said District Court.

(Seal) ATTEST my hand and the seal of said District Court, this 22 day of October, A. D., 1921.

CHAS. N. WILLIAMS, Clerk,

By Louis J Somers

Deputy Clerk.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, NORTH-EARN DIVISION.) IN THE DIS-) TRICT COURT) SS. NO. B-68) IN EQUITY.
---	--

THE UNITED STATES OF AMERICA,)
	) PETITION FOR
Plaintiff,	) APPEAL TO
	) THE UNITED
vs.	) STATES
	) CIRCUIT
TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation,	) COURT OF) APPEALS FOR) THE NINTH) CIRCUIT.
HARRY CHANDLER, O. P.)
BRANT, M. H. SHERMAN and)
E. P. CLARK,)
)
Defendants.)

The above named plaintiff, conceiving itself aggrieved by the judgment and decree of dismissal made and entered on the 6th day of October, 1921, in the above entitled cause, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree were made and entered, duly authenticated, may be sent to and filed with said the United States Circuit Court of Appeals

for the Ninth Circuit, and that a citation be issued as provided by law.

Joseph C. Burke

United States Attorney.

George A. H. Fraser,

Special Assistant to
the Attorney General,
Attorneys for Plaintiff.

[Endorsed]: UNITED STATES OF AMERICA,
SO. DISTRICT OF CALIFORNIA, NORTHERN
DIVISION. THE UNITED STATES OF AMER-
ICA, Plaintiff - vs - TITLE INSURANCE AND
TRUST COMPANY, a corporation, SECURITY
TRUST AND SAVINGS BANK, a corporation,
HARRY CHANDLER, O. P. BRANT, M. H.
SHERMAN and E. P. CLARK, Defendants. IN
THE DISTRICT COURT No. B-68 IN EQUITY.
PETITION FOR APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT. FILED Mar 10 1922 Chas.
N. Williams, Clerk By Edmund L. Smith *Deputy*
Clerk

UNITED STATES OF AMER-	)	IN THE DIS-
ICA, SOUTHERN DISTRICT	)	TRICT COURT,
OF CALIFORNIA, NORTH-	)	SS. No. B-68
ERN DIVISION	)	IN EQUITY.

THE UNITED STATES OF)
AMERICA,)

Plaintiff,)
------------	---

vs.)
-----	---

TITLE INSURANCE AND	)	ASSIGNMENT
TRUST COMPANY, a corpora-	)	OF ERRORS.
tion, SECURITY TRUST AND)	
SAVINGS BANK, a corporation,)	
HARRY CHANDLER, O. P.)	
BRANT, M. H. SHERMAN and)	
E. P. CLARK,)	

Defendants.)
-------------	---

COMES NOW the plaintiff above named and respectfully represents that in the record, proceedings and decree in the above entitled cause, there is manifest error, in this, to-wit:

1: That the Court erred in sustaining defendants' motion to dismiss the bill of complaint herein.

2: That the Court erred in making and entering the final decree herein after plaintiff had elected to stand on its complaint.

3: That the Court erred in dismissing the bill of complaint in said cause, in and by said final decree.

4: That said final decree is contrary to law and equity in this, to-wit: That the motion to dismiss said bill of complaint should have been overruled and defendants required to answer said bill of complaint.

5: That the Court erred in refusing and denying the injunction prayed in said bill of complaint.

6: That the Court erred in holding, in and by said final decree, that said bill of complaint does not state any matter of equity entitling plaintiff to the relief prayed for or any relief, and in holding therein and thereby that the facts stated in said bill are not sufficient to entitle plaintiff to the relief prayed for or to any relief against defendants or any of them.

7: That the Court erred in holding in and by said final decree that the Tejon Indians mentioned in said complaint abandoned and lost all and singular the claims, rights, titles and interests of occupancy and possession described in said complaint by failure to present the same to the Commission appointed under and by virtue of the Act of Congress of March 3, 1851 (9 Stat. L. 631) to adjust land claims in California.

8: That the Court erred in holding in and by said decree that the patent issued by the United States to defendants mentioned in said complaint and covering the lands in said complaint described is conclusive of the title of defendants, and that under and by virtue of said patent said title is free from, clear of and not subject to any claim, right, title and interest of the Tejon Indians set forth in said bill of complaint.

9: That the Court erred in holding in and by said decree that said Tejon Indians are not and were not "third parties" whose rights under said Act of March 3, 1851, remained and remain unaffected by the issuance of said United States patent to defendants.

10: That the Court erred in holding in and by said decree that defendants' title was not and is not now charged with and subject to the Indian right, title and interest of occupancy, use and possession described in the complaint.

11: That the Court erred in holding in and by said decree that said Act of March 3, 1851, required said Tejon Indians to appear before the Board of Commissioners created by said Act, there to set up and maintain said title of occupancy and possession, or for any purpose, or at all.

12: That the Court erred in holding in and by said decree that under said Act of March 3, 1851, said Tejon Indians and all other Indians similarly situated were not to be regarded as on a different footing and in a different class from those persons who were required to present their claims or titles before said Board.

13: That the Court erred in holding in and by said decree that land charged with and subject to said Indian title is not and cannot properly be known as "public domain."

14: That the Court erred in holding in and by said decree that land charged with and subject to said Indian title is not and cannot properly be known or described as "public land of the United States."

15: That the Court erred in holding in and by said decree that the Act of the State of California of April 22, 1850, later adopted by Congress as a safeguard for said Tejon Indians and other Indians by the Act of

January 12, 1891 (26 Stat. L. p. 712, Section 6) did not and does not protect said Tejon Indians, and did not and does not affect the property described in the complaint with an easement or a trust in favor of said Indians prior and superior to any title or titles of defendants and constituting a right of use, occupancy and possession superior to any title or titles of defendants.

16: That the Court erred in holding in and by said decree that the object of said Act of 1851 was not fully served when the Mexican grantees presented their title for confirmation, without presentation by said Indians of their said title.

17: That the Court erred in holding in and by said decree that said Tejon Indians, being wards of the United States and *non sui juris* were charged with knowledge of said Act of March 3, 1851, or any of its provisions or requirements, and that it was the intention of Congress to make said Act applicable to such Indians or bind them by any of its provisions.

18: That the Court erred in holding in and by said decree that the case at bar is governed by the decision in *Barker v. Harvey*, 181 U. S. 481; 126 Calif. 262, and that it is not distinguishable in fact therefrom, especially in that in *Barker v. Harvey* it was found as a fact that prior to the Mexican grant the Indians there concerned had abandoned their occupancy and that the grant as finally allowed contained no provision for their protection, whereas, in the case

at bar the land in controversy has been continuously occupied and is still occupied by the Tejon Indians, except as to parts thereof from which they have been wrongfully and forcibly expelled by defendants, and the Mexican grant as finally confirmed contains a specific provision for the protection of said Tejon Indians.

19: That the Court erred in holding in and by said decree that the provision in the Mexican grant described in the complaint forbidding interference with the cultivation and improvements of the Tejon Indians is no longer in force, and that the same was superseded or extinguished by the issuance to defendants of the United States patent described in the complaint, or in any other way, or at all.

20: That the Court erred in holding in and by said decree that said United States patent changed or enlarged the rights of the grantees therein by relieving or discharging said rights of or from the easement, trust or use of occupancy and possession by the Tejon Indians of a portion of the land conveyed by said patent and described in the complaint.

WHEREFORE, plaintiff prays that the errors herein be corrected and its appeal sustained; that said judgment and decree be reversed; that the bill of complaint herein be sustained as against defendants' motion to dismiss, and that defendants be required to answer said bill.

Joseph C. Burke

United States Attorney.
George A. H. Fraser,

Special Assistant to the Attorney General,
Attorneys for Plaintiff.

[Endorsed]: B 68 UNITED STATES OF AMERICA, SO. DISTRICT OF CALIFORNIA, NORTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff, - vs - TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK, Defendants. IN THE DISTRICT COURT No. B-68. In Equity. ASSIGNMENT OF ERRORS. FILED MAR 10 1922 CHAS. N. WILLIAMS, Clerk By Edmund L Smith
Deputy Clerk

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.	)	IN THE DISTRICT COURT.
	)	SS. No. B-68
	)	IN EQUITY.

THE UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
- v -)	
)	
TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK,	)	ORDER ALLOWING APPEAL.
)	
Defendants.)	

THIS CAUSE coming on this day to be heard upon the petition of plaintiff for an order allowing an appeal

to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered herein on, to-wit: the 6th day of October, 1921, as in said petition more fully set forth, and the court, being now fully advised in the premises, it is hereby

ORDERED That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said final decree is hereby allowed.

Given at Los Angeles, California, this 10th day of March, 1922.

BY THE COURT

Trippet.

District Judge.

Approved as to form but reserving all rights O'Melveny Millikin and Tuller attorneys for defendants

[Endorsed]: B 68 UNITED STATES OF AMERICA, SO. DISTRICT OF CALIFORNIA NORTHERN DIVISION. THE UNITED STATES OF AMERICA, plaintiff, - vs - TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK, defendants. IN THE DISTRICT COURT No. B-68 IN EQUITY ORDER ALLOWING APPEAL. FILED MAR 10 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith *Deputy Clerk* Eq. O. Bk.

UNITED STATES OF AMERICA District Court
of the United States SOUTHERN DISTRICT
OF CALIFORNIA, NORTHERN
DIVISION.

THE UNITED STATES OF AMERICA,	}	CLERK'S OFFICE
Plaintiff,		
- vs -		
TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK,	}	No. B-68 In Equity.
Defendants.		
		PRÆCIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue transcript of record on appeal in the above entitled case, consisting of:

Complaint

Summons with return of Service.

Motion to dismiss.

Order sustaining the motion to dismiss.

Plaintiff's election to stand on complaint.

Judgment of dismissal.

Plaintiff's exceptions to order sustaining motion to dismiss and to judgment.

Statement that no opinion was rendered by the Court.

Certificate of Clerk to judgment roll.

Petition for appeal.

Assignment of Errors.

Order allowing appeal.

Præcipe for transcript of record.

Proof of service of same on defendants.

Citation and return of service thereon.

Clerk's certificate to transcript of record.

Joseph C. Burke

United States District Attorney.

George A. H. Fraser,

Special Assistant to the Attorney General

Attorneys for Plaintiff.

[Endorsed]: RECEIPT OF COPY OF THE FOREGOING PRÆCIPE IS HEREBY ACKNOWLEDGED ON BEHALF OF DEFENDANTS AT LOS ANGELES, CALIFORNIA, THIS 10 DAY OF MARCH, 1922. O'Melveny, Millikin & Tuller, Attorneys for Defendants.

No. B-68 U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA Northern Division. THE UNITED STATES OF AMERICA, Plaintiff, - vs - TITLE INSURANCE AND TRUST COMPANY, a corporation, SECURITY TRUST AND SAVINGS BANK, a corporation, HARRY CHANDLER, O. P. BRANT, M. H. SHERMAN and E. P. CLARK, Defendants. PRÆCIPE FOR TRANSCRIPT ON APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT. FILED MAR 11 1922 CHAS. N. WILLIAMS Clerk. *By Edmund L. Smith Deputy Clerk.*

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

THE UNITED STATES OF)	
AMERICA,)	
Plaintiff,)	
vs.)	
TITLE INSURANCE AND)	
TRUST COMPANY, a corpora-)	CLERK'S
tion, SECURITY TRUST AND)	CERTIFICATE.
SAVINGS BANK, a corporation,)	
HARRY CHANDLER, O. P.)	
BRANT, M. H. SHERMAN and)	
E. P. CLARK,)	
Defendants.)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 44 pages, numbered from 1 to 44 inclusive, to be the transcript of record on appeal in the above entitled cause, as printed by appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, complaint, summons with return of service, motion to dismiss, decree of dismissal, certificate of clerk to judgment roll, petition for appeal, assignment of errors, order allowing appeal, præcipe for transcript and proof of service, and I do further certify that no opinion was rendered by the court.

I DO FURTHER CERTIFY that the fees of the clerk for comparing, correcting and certifying the foregoing record on appeal amount to and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 31st day of ^{March} April, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By *R. S. Zimmerman*

Deputy.

Seal

IN THE
United States
Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant,

v.

TITLE INSURANCE AND TRUST COMPANY,
a corporation, SECURITY TRUST AND SAV-
INGS BANK, a corporation, HARRY
CHANDLER, O. P. BRANT, M. H. SHER-
MAN and E. P. CLARK.

Appellees.

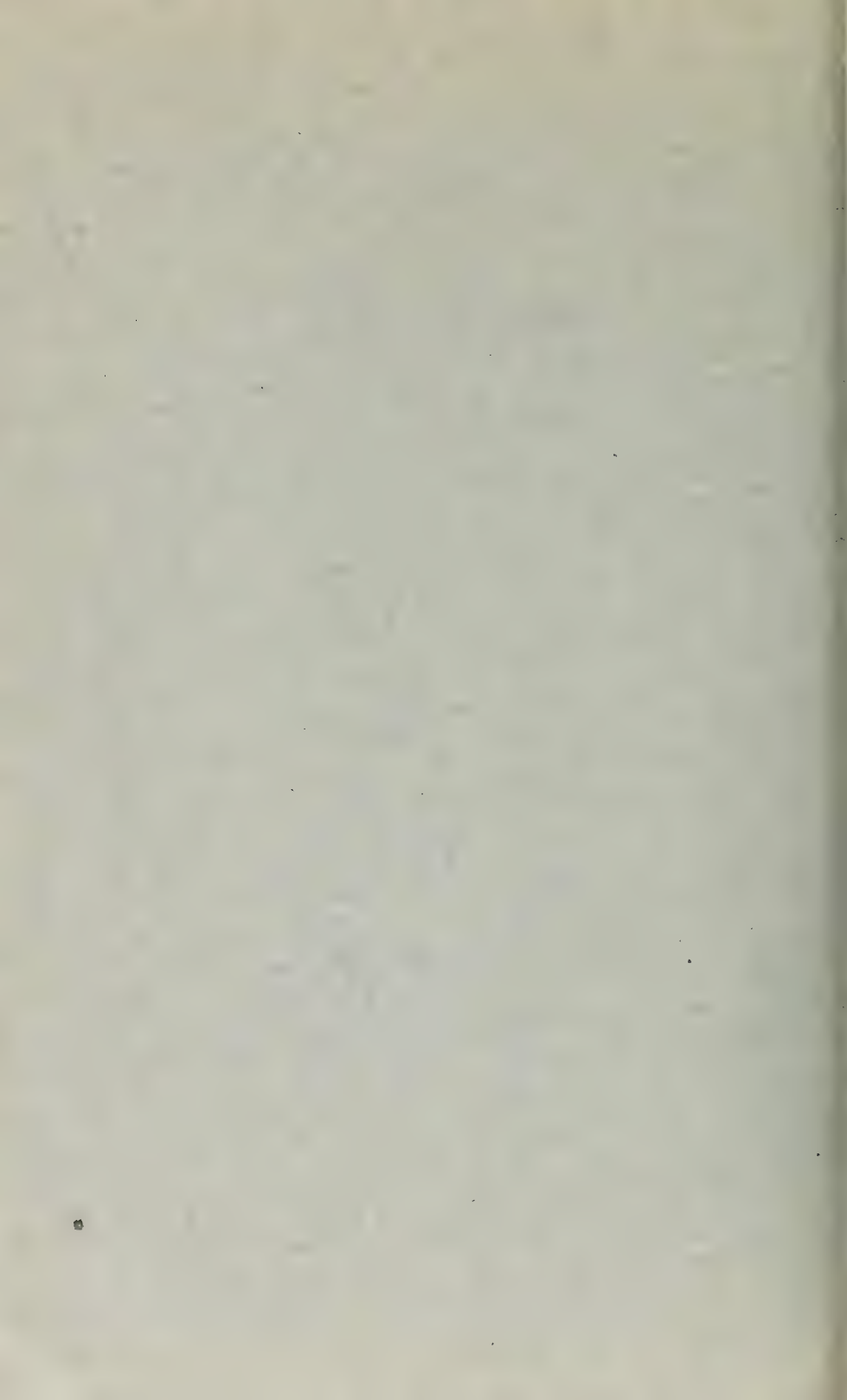
JOSEPH C. BURKE,

United States Attorney,

GEORGE A. H. FRASER,

Special Assistant to the Attor-
ney General,

Attorneys for Appellant.



IN THE

United States

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

No. 3856.

UNITED STATES OF AMERICA,

Appellant,

v.

TITLE INSURANCE AND TRUST COMPANY,
a corporation, SECURITY TRUST AND SAV-
INGS BANK, a corporation, HARRY
CHANDLER, O. P. BRANT, M. H. SHER-
MAN and E. P. CLARK.

Appellees.

BRIEF OF APPELLANT

Statement of Case

This case comes on appeal from the District Court for the Southern District of California, Northern Division. In due time after complaint was filed defendants interposed a motion to dismiss in the na-

ture of a general demurrer; the motion was sustained; plaintiff elected to stand on its complaint; and on October 6, 1921, a final decree of dismissal was entered. From that decree this appeal is taken.

The suit is somewhat analogous to a suit to quiet title. In it the United States, as guardian for the surviving remnant of a tribe of Indians from time immemorial living on a described tract in Kern County, California, seeks to have their original title of occupancy and possession, which is fortified by a provision for their protection found in the grant whereby the fee title passed from the Mexican Government, confirmed and established as a species of easement or use to which all rights and titles now belonging to defendants are subject. Compensation is also asked for various acts of wrong and oppression committed by defendants and an injunction to prevent further molestation of the Indians.

An attempt has been made in the complaint to plead none but essential facts, so that an abstract of it cannot adequately represent the original. The following summary, however, may give the Court an outline idea of its contents

1. The suit is brought by authority of the Attorney General of the United States at the request of the Secretary of the Interior in furtherance of the Indian policy of the Government, which is here acting as guardian of a band or tribe of Mission Indians, wards of the United States, and incompetent to manage their own affairs, known as Tejon Indians, and from time immemorial residing on a described tract in Kern County, California. The above

mentioned officials in bringing the suit are acting not only in the general line of their duty and in defense of the general Indian title of occupancy and use, but also under the specific requirements of the Act of Congress of January 12, 1891 (26 Stat. L. 712), directing them to defend Mission Indians residing within any confirmed private grant in the rights secured to them both by the original grant and by the Act of the State of California of April 22, 1850 (hereinafter quoted), which provides that proprietors of land on which Indians reside must not interfere with their possession, although they may, by judicial procedure, obtain a segregation of a sufficiency of land for their separate occupancy, including their home or village.

The jurisdiction of the court is based on the fact that the United States is plaintiff.

(Complaint, Pars. I, III, XI; Transcript, pp. 1, 2, 5, 18, 19.)

2. Defendant, Title Insurance and Trust Company, a California corporation, doing business in Los Angeles, has held since September 19, 1916, the fee title to El Tejon Rancho of some 98,000 acres lying partly in Kern County, California. Defendant, Security Trust and Savings Bank, also a California corporation doing business in Los Angeles, is trustee under a deed of trust creating a lien on said ranch to secure notes aggregating one million dollars; and the individual defendants, Chandler, Brant, Sherman and Clark, all of whom are residents of the Southern judicial district of California, are in actual possession and control of the ranch under some right or

claim of right apparently derived from Title Insurance and Trust Company, but the precise nature and extent of which plaintiff has been unable to learn.

A portion of said ranch lying in said Kern County and comprising 5,364 acres, with water rights appurtenant thereto, is described by metes and bounds as the subject matter of the suit; and for convenience will be hereinafter called the "Indian tract." All the various titles and rights of defendants in or to said tract are averred to be subject to a right of occupancy, possession and use vested in said Tejon Indians under the following facts:

(Complaint, Pars. II, IV; Transcript, pp. 5, 6, 7, 8.)

3. During the entire time of Spanish and Mexican sovereignty over what is now the State of California, and from time immemorial, the Indian tract, and much circumjacent territory, were continuously occupied by the Tejon Indians, ancestors and predecessors of the present tribe, a peaceful and sedentary people, who resided thereon in permanent dwellings, raising crops, ranging cattle, and collecting the natural products of the soil. They were at that time and still are under the spiritual charge of the Catholic Church and are described as Mission Indians. Under the laws of both Spain and Mexico these Indians were entitled to the undisturbed possession and use of the land they occupied, together with appurtenant water, for habitation, tillage, pasture, hunting, fishing, gathering the natural products of the soil, and all other ordinary purposes. This Indian right and title was protected by said laws as long as

Spain and Mexico held sovereignty over California, and the land in question was charged therewith when it came under the jurisdiction of the United States.

(Complaint, Par. V., Transcript, pp. 8-10.)

4. Up to May 30, 1843, the Indian tract lay within the public and ungranted lands of Mexico. On that date two Mexicans petitioned the Mexican Governor of California for the grant of a region known as El Tejon, which included the Indian tract; the regular proceedings were had upon said application, and on June 30, 1845, the grant was finally approved. It contained a condition reading when translated: "They (the grantees) must not interfere with the cultivation and other advantages which the Indians who are found established in said place have always enjoyed." After the United States acquired California under the treaty of Guadalupe Hidalgo, these Mexican grantees petitioned the Board of Commissioners, appointed under the Act of Congress of March 3, 1851, to settle private land claims (9 Stat. L. 631), for confirmation of the grant. The case was heard and on May 8, 1855, confirmation issued. In its opinion the Board said, with reference to the above-quoted condition in the grant: "This restriction we have heretofore decided does not affect the right of property, though it may create a use in favor of the Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal." On appeal, first to the United States District Court and then to the Supreme Court of the United States, the Board's de-

cision was affirmed, and on May 9, 1863, a United States patent was issued conveying to said Mexican grantees certain described premises including the Indian tract. The granting clause of the patent contained the following language: "But with the stipulation that, in virtue of the 15th Section of the said Act (March 3, 1851) the confirmation of this claim, and this patent, 'shall not affect the interests of third persons.' " Thereafter by mesne conveyances the title granted by the patent passed to defendants herein, subject, however, under the facts above recited, to the right of occupancy, possession and use of the Indian tract by the Tejon Indians.

(Complaint, Pars. V, VI, VII, VIII; Transcript, pp. 8-13.)

5. The treaty of Guadalupe Hidalgo in terms protected all existing rights and titles; also, the law of the United States and the law of nations, as often announced by the Supreme Court, uphold said Indian right and title in like manner as did the laws of Spain and Mexico. It could be extinguished by the sovereign only and no sovereignty concerned, including the United States, has ever extinguished, modified or diminished it.

Notwithstanding this, the successors of the original grantors, beginning probably about 1888, commenced a course of oppression and exclusion, gradually forcing the Indians back from the outer limits of the Indian tract, pulling down their houses, destroying their crops, throwing their cultivated fields into cattle range and in other ways narrowing the limits and restricting their use of the land. Defendants, when they acquired title, retained and devoted

to their own use the land thus wrongfully appropriated, and threaten to continue to hold it and perpetually to exclude the Indians therefrom.

Further, defendants have continued and extended the same policy of repression and exclusion, and have made it impossible for the Indians to possess or use the greater portion of the Indian tract at all, or any portion of it peaceably or securely. They refuse to permit any Indian to own so much as one cow to furnish milk for children, or to own horses except so far as they are useful on defendants' ranch, on which some of the Indians labor, or to allow them to improve or repair their huts even when the occupants have obtained material for the purpose. They have interfered with the use by the Indians for irrigation of the creeks flowing through the Indian tract; they have fenced off and are using land once cultivated by the Indians, and still needed by them for their subsistence; when Indians have died or been driven out, they have pulled down their houses, destroyed their improvements and turned their cultivated ground into cattle range, and they have by duress compelled many of the Indians employed on the ranch to submit to a deduction from their wages, under the guise of rent for the premises occupied by them.

Up to the present the result has been that the number of the Indians has been reduced from about 300 to about 80, and the land occupied by them has been diminished from 5,364 acres to about 65 acres, which last mentioned tract is still occupied, used and cultivated by the remnants of the band. Defendants, however, are still pursuing oppressive courses such

as above described and threaten to continue so to do until all the Indians are driven from the Indian tract and their possession and use thereof are totally destroyed.

(Complaint, Par. IX; Transcript, pp. 13-17.)

6. The Indian right of occupancy and use includes the right of ingress and egress to and from said Indian tract over roads connecting said tract with the county roads. It includes a first and prior right of immemorial antiquity in Tejon and Cedar Creeks flowing through the Indian tract to enough water to irrigate the irrigable portions thereof, estimated at 7 cubic feet per second. About 350 acres of the tract are riparian to and continuously irrigable from these creeks, and an additional acreage is irrigable therefrom for early crops. Continuously since 1843 and from time immemorial, the irrigable acreage has been irrigated and cultivated by the Indians except as and when they have been restricted and prevented by defendants, and the acreage still remaining in Indian possession is irrigated by them to the fullest extent permitted by defendants. From 600 to 900 acres of the Indian tract have been cultivated and cropped by the Indians during the same period except as and when defendants have prevented. The remainder has been in their use for cattle range, hunting and gathering the natural produce of the soil, as hereinabove indicated.

A map showing the Indian tract, the land now irrigated and cultivated by the Indians, the land formerly irrigated by them, the arable land within the tract, the former and present irrigation ditches and

other details, is attached as an exhibit to the complaint and is reproduced in the Transcript.

(Complaint, Par. X; Transcript, pp. 17, 18, 22.)

7. Damages for the wrongful acts of defendants are asked under three heads; (a) for the appropriation and use by defendants of the portions of the Indian tract from which the Indians were expelled by defendants' predecessors, \$75,000; (b) for the expulsion of the Indians from other portions by defendants, with continued possession and use thereafter, \$2500; (c) for the further molestation of the Indians and restrictions and limitations placed on their use and enjoyment of what they still possess, \$50,000.

(Complaint, Par. XII; Transcript, pp. 19, 20.)

The prayer is for answer and discovery; for the establishment and confirmation of the Indian title as against the fee title and all other titles of defendants; for a permanent injunction forbidding interference with or molestation of the Indians in their possession and use of the Indian tract, with a temporary injunction, **pendente lite**; for damages in the sum of \$127,500, and for general relief.

Defendants moved to dismiss to the bill "on the ground that the same does not state any matter of equity entitling defendant to relief prayed for, nor to any relief, nor are the facts stated sufficient to entitle plaintiff to any relief against these defendants or any of them."

(Transcript, p. 27.)

In support of this they presented two contentions:

1. That the patent issued by the United States to defendants' predecessors in interest is conclusive of the title of defendants, and that such title is free from any and all claims of the nature attempted to be enforced by the complaint.

2. If the Indians had any claims prior to the issuance of the patent, they were abandoned by failure to present them to the Land Commission.

Both of these rested on a single case, *Harvey v. Barker*, 126 Cal. 262, affirmed in *Barker v. Harvey*, 181 U. S. 481.

The Court sustained the motion and dismissed the suit without disclosing which of these contentions he approved or whether he upheld them both.

SPECIFICATION OF ERRORS RELIED UPON

All the errors set forth in the Assignment of Errors will be urged. Some of them which separately state different aspects of the same legal position may, however, for brevity be combined and the errors presented in concentrated form, thus:

1. There was error in sustaining the motion to dismiss on the ground of lack of equity in the complaint or lack of facts sufficient to entitle plaintiff to relief, and error in entering judgment of dismissal after plaintiff had elected to stand on the complaint.

(Assignments of Error 1, 2, 3, 4, 5, 6.)

2. There was error in holding thereby, in effect, that the Tejon Indians were intended and required by the Act of Congress of March 3, 1851, to appear before the Board of Land Commissioners created by that Act, there to set up and maintain their title of occupancy and possession, and that by failure to do so, they lost the rights outlined in the complaint.

(Assignments of Error 7, 11, 12.)

3. There was error in interpreting said Act, in effect, to mean that Congress intended tribal Indians, **non sui juris** and incompetent to manage their own affairs, to be charged with knowledge of said Act and its requirements, and that it intended to require such Indians to present their aboriginal title for confirmation under penalty of losing their rights and homes.

(Assignments of Error 16, 17.)

4. There was error in holding thereby, in effect, that the Tejon Indians are not "third persons" whose rights were reserved in the United States patent issued to defendants' predecessors; and that the patent conveyed a title free from and discharged of the Indian easement, trust, or use of occupancy and possession.

(Assignments of Error 8, 9, 10, 20.)

5. There was error in holding thereby, in effect, that by the issuance of said patent, or in any other way, the provision in the Mexican grant forbidding interference with the cultivation and improvements of the Tejon Indians was abrogated or extinguished.

(Assignment of Error 19.)

6. There was error in holding thereby, in effect, that land charged with said Indian title cannot

properly be described as public domain or public land of the United States.

(Assignments of Error 13, 14.)

7. There was error in holding thereby, in effect, that the California Act of April 22, 1850, adopted by Congress as a safeguard for Indians by the Act of January 12, 1891 (26 Stat. L. 712), did not and does not protect said Tejon Indians in accordance with its terms.

(Assignment of Error 15.)

8. There was error in holding thereby, in effect, that the case at bar is governed by *Barker v. Harvey*, 181 U. S. 481; 126 Cal. 262 and that it is not distinguishable therefrom in its facts; especially in that in *Barker v. Harvey* it was found that the grant as finally confirmed contained no provision for the protection of the Indians and further that they had in fact voluntarily abandoned their occupancy, whereas in the case at bar the land in controversy has been continuously occupied by the Tejon Indians, and is still occupied by them, except insofar as they have been wrongfully and forcibly expelled, and the Mexican grant, as finally confirmed, contains a specific provision for their protection.

(Assignment of Error 18.)

ARGUMENT

The general topics of discussion will be the Tejon Indians' aboriginal title of occupancy and use, acknowledged by Spain and Mexico up to the time when California came within the jurisdiction of the United States; the special provision for the protection of that title in the Mexican grant here involved;

the undertaking of the United States by the treaty of Guadalupe Hidalgo to respect it; the rights incident to and derivative from it under the laws of the United States, as established by judicial decisions; the purpose and scope of the Act of March 3, 1851, relating to California land claims, with a demonstration from the Act itself that it not only did not require affirmative action by the Indians for the maintenance of their title, but that it expressly reserved it from the operation of the Act and directed the Commissioners to investigate it as a Board of Inquiry only, with power to report but not to adjudicate; principles of statutory construction supporting this conclusion; contemporaneous legislation of Congress and of the State of California to the same effect; later congressional action confirmatory of this view; and an examination of *Barker v. Harvey*, 181 U. S. 481, the sole case relied upon by appellees, distinguishing it from the case at bar.

The familiarity of this Court with the general title of Indians to land in their occupancy is illustrated by its recent decision in *Cramer v. United States*, 267 Fed. 78, sustaining several of our contentions here. Yet the nature and incidents of that title have so essential a bearing on the situation existing when the Act of 1851 was passed and on the necessary construction of that Act that we hope to be pardoned for presenting them in some detail. Even if we do not succeed in adding anything new, our citations will at least refresh the Court's recollection as to the doctrines of the Supreme Court governing the various features of the Indian right.

Taking up the above topics in their order:

1. At the time when California passed under the sovereignty of the United States the Tejon Indians possessed under Spanish and Mexican law an undisputed right and title of possession and use of the land actually occupied by them, being the Indian tract described in the Complaint.

The complaint in Paragraph V avers that from time immemorial prior to the date of application for the Mexican grant here involved, and during the entire period of Spanish and Mexican sovereignty over the present State of California, the Indian tract, with circumjacent territory, was continuously and exclusively possessed and occupied for agriculture, pasture and residence by the Tejon Indians, being the ancestors and predecessors of the present tribe or band of that name. Paragraph X gives details of their cultivation, water rights and irrigation thereon.

Under these facts, both Spain and Mexico, while claiming the ultimate domain over the lands of the new world, recognized a possessory right in the aboriginal inhabitants which could be disturbed or extinguished by the sovereign only, and which was protected meanwhile by a long series of enactments of uniform tenor. Space permits the quotation of but a very few of these numerous edicts, and we will confine ourselves to those regulating the apportionment of lands in Mexico and the Indies among the Spaniards, but invariably preserving the Indian occupancy and use, and will omit the long array of laws giving general protection to the Indians.

A Spanish decree originating in 1532 and re-enacted in 1553 and 1596, in dealing with the sale, composition and disposition of public lands provides: "To the Indians **should be left their lands, cultivated ground and pastures** in such manner that they may not lack what is necessary, and that they may have all the comfort and repose possible for the sustenance of their houses and families."

Recopilacion de las Indias, Book 4, Title 12,
Law 5.

Hall Mexican Law, Sec. 36.

2 White's New Recopilacion, p. 50.

A law of 1588 on the same subject required that "the apportionment of lands in the new settlements, as well as those which are already settled, shall be made without * * * any damage to the Indians."

Recop. de las Indias, Bk. 4, Tit. 12, Law 7.

Hall's Mexican Law, Sec. 38.

"We command that the farms and lands which shall be given to the Spaniards **shall be without prejudice to the Indians**; and that those which have been given to their prejudice or damage shall be returned to whom by law they may belong." (1594.)

Ibid, Bk. 4, Tit. 12, Law 9.

Hall, Sec. 40.

"And there shall be apportioned to the Indians what may be conveniently necessary for them to cultivate and to sow and to raise cattle, **and the lands which they now have shall be confirmed to them** and others which may be necessary shall be given them." (1578 and 1589.)

Ibid., Bk. 4, Tit. 12, Law 14.

Hall, Sec. 45.

Reynolds Spanish and Mexican Land Laws,
p. 47.

2 White's New Recop., p. 52.

“We order that the sale, benefit and composition of lands be made with such consideration that the Indians be **left with, above all, what lands shall belong to them**, as well to the individual Indian as to the communities, and **the waters and places of irrigation; and the lands in which they have made ditches for irrigation or any other benefit, with which, by their personal industry, they have fertilized, shall be reserved in the first place**, and in no case can they be sold or alienated.” (1642.)

Ibid., Bk. 4, Tit. 12, Law 18.

Hall, Sec. 49.

Even when the Spanish government in the exercise of its sovereign right concentrated the Indians into settlements for convenience in Christianizing and civilizing them, it did not deprive them of the lands from which they had been removed.

“The Indians will be concentrated into settlements with greater willingness and readiness if they do not give up the **lands and profits which they had in the places which they left**; therefore, we command that there be no change in this regard, and that they **keep them as they have held them previously in order to cultivate them and use them for their profit.**” (1560.)

Recop., Bk. 6, Tit. 3, Law 9.

A decree of February 9, 1811, provides “that the natives and inhabitants of America can sow and cul-

tivate as much as nature and art shall make competent for them in those climates.”

Hall, Sec. 165.

In like manner Article 31 of the regulations of the intendent Morales for granting lands to colonists in Louisiana and West Florida, reads:

“Indians who possess lands within the limits of the Government shall not in any manner be disturbed. On the contrary, they shall be protected and supported, and to this the commandments, syndics and surveyors ought to pay the greatest attention, to conduct themselves accordingly.”

2 White's Recop., p. 242.

Citations to the same effect as the foregoing, protecting the Indians' possession from private interference and allowing no diminution of their title except by the government itself might be multiplied indefinitely.

These edicts of the Spanish Crown not only were in force when Mexico achieved its independence in 1821, but survived as a portion of the fundamental law of the new republic.

Hall Mexican Law, Sec. 85.

Rockwell Spanish and Mexican Law, pp. 17-18.

American Insurance Co. v. Canter, 1 Pet 511, 542, 544.

Mitchel v. United States, 9 Pet. 711, 734.

The plan of Iguala of February 24, 1821, outlining the principles of the new government, declared that “all the inhabitants of New Spain, Africans or

Indians, are citizens of this monarchy, with a right to be employed in any post according to their merits and efforts," and that "the person and property of every citizen shall be recognized and protected by the government."

These principles were reaffirmed in the treaty of Cordova, August 24, 1821, between Spain and Mexico, the Declaration of Independence of September 28, 1821, and subsequent enactments (Hall, Mexican Law, Sec. 161) and remained in effect long after Alta California was ceded to the United States.

The status of the Indian land title under both sovereignties is thus summarized by a well-known authority:

"It is clear from the whole tenor of the Spanish and Mexican laws, whether in the form of pueblos or ranchos, that the Indians are entitled in equity and good conscience, and even according to the strict rigor of the laws, **to all the lands they have or have had in actual possession for cultivation, pasture or habitation, when such domain can be ascertained to have had any tolerably well-defined boudaries.** Both Spain and Mexico have acknowledged this principle to be a just one. President Juarez acted in accordance therewith when, on the 30th day of September, 1867, he issued his circular to the Governor of Chihuahua, and also extended the same to all the Republic, in which he declared that **the Indians were entitled to the lands of which they had the actual, real and true possession.**"

Hall, Mexican Law, Sec. 159.

This circular, issued under direction of the Pres-

ident by the Department of Justice and Public Works and embodying a scheme whereby the Indians were to receive from the Government gratis the fee title to the lands they held under possessory title, is quoted in full in Hall, Secs. 645-648.

The report of William Carey Jones, appointed by the Secretary of the Interior on July 5, 1849, with instructions to report on land titles in California and to ascertain, among other things, "the nature of the Indian rights as existing under the Spanish and Mexican Governments, and as subsisting when the United States obtained the sovereignty," is found in Senate Document 18, 31st Congress, 1st Session. The following brief excerpts show the tenor of his long dissertation on this topic:

"It is a principle constantly laid down in the Spanish colonial laws that the Indians shall have a right to as much land as they need for their habitations, for tillage and for the pasturage of their flocks. When they were already partially settled in communities sufficient of the land which they occupied was secured them for these purposes. * * * The early laws were so tender of the rights of the Indians that they forbade the allotment of lands to Spaniards and especially the rearing of stock where it might interfere with the tillage of the Indians."

Speaking of the situation subsequent to Mexican independence, he continues:

"We must say, therefore, that, however mal-administration of the law may have destroyed its interest, the law itself has constantly asserted the rights of the Indians to habitations and sufficient

fields for their support. * * * I understand the law to be that **wherever Indian settlements are established and they till the ground they have a right of occupancy in the land which they need and use; and whenever a grant is made which includes such settlements, the grant is subject to such occupancy.** * * * I believe these remarks cover the principles of the Spanish law in regard to Indian settlements as far as they have been applied in California, and are **conformable to the customary laws that has prevailed there."**

Halleek's Report on California Land Titles,
pp. 112, 113.

These views have been affirmed by the Supreme Court. For example:

"They (the original Indian inhabitants) were admitted to be the rightful occupants of the soil with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; * * * The absolute ultimate title has been considered as acquired by discovery subject only to the Indian title of occupancy which title the discoverers possessed the exclusive right of acquiring."

Johnson v. McIntosh, 8 Wheat. 543, 574,
592.

"Spain at all times or from a very early date acknowledged the Indians' right of occupancy in these lands. * * * The grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy has ceased and it was not

in the power of the Spanish Government to authorize anyone to interfere with it.”

Chouteau v. Moloney, 16 How. 203, 228, 239.

Additional decisions to the same effect will be found hereinafter cited in other connections. They are not added here because we believe our point to be sufficiently established.

(a) This Indian right was an aboriginal right antedating the sovereignty of Spain or Mexico and not derived from either, but recognized and protected in the amplest manner and from the earliest times by the general law of both.

The proposition that the Indian title is **original and not derivative** is established by the inherent nature of that title, by the language of the Spanish laws quoted and by repeated decisions of the Supreme Court. It has not only a general but a very special bearing on the construction of the Act of 1851, since the obligations of that Act rested only on those claiming lands by virtue of any right or title **derived** from the Spanish or Mexican Government; and for this reason we will discuss it later at the place where it is immediately relevant. For the present it is enough, as an indication of the trend of authority, to quote very briefly from two cases:

“The Indian nations have always been considered as distinct, independent, political communities, retaining their **original natural rights as the undisputed possessors of the soil from time immemorial.**”

Worcester v. Georgia, 6 Pet. 515, 559.

“Throughout, the Indians, as tribes or nations,

have been considered as distinct, independent communities **retaining their original natural rights as the undisputed possessors of the soil from time immemorial.**"

Holden v. Joy, 84 U. S. 211, 244.

We respectfully ask the Court to notice when it reads the Supreme Court decisions later quoted on this point that they also emphasize the other element of the topic, viz.: that the Indian title under the former sovereignties was not any vague or uncertain right, but a clear-cut, authentic and undisputable title, defined by the limits of actual Indian possession, and repeatedly safeguarded on grounds both of justice and policy (Mitchel v. United States, 9 Pet. 711, 740), by the laws of Spain later carried over as part of the jurisprudence of Mexico and followed by that government as already shown. The Tejon Indians came within the sovereignty of the United States, therefore, in full possession of this established, unquestioned and original property right extending over the entire Indian tract, which right, as we shall presently show, had already been recognized by the law of this country to be as sacred as the fee simple absolute title of the whites.

(b) **The Indian title was further acknowledged and fortified in the case at bar, before the transfer of sovereignty, by the special provision for protection of these Indians found in the Mexican grant above quoted.**

The general laws of Spain and Mexico above cited require that in granting public lands to whites, resident Indians shall be left undisturbed in their

possession, and that that possession shall be confirmed to them. Jones' report above referred to states the law to be that "whenever a grant is made which includes such (Indian) settlements the grant is subject to such occupancy." This principle has been recognized by our Supreme Court.

"It is not meant * * * that the Spanish governors could not relinquish the interest or title of the crown in Indian lands * * *, **but when that was done the grants were made subject to Indian occupancy.** They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize anyone to interfere with it."

Chouteau v. Moloney, 16 How. 202, 239.

Thus the Indian title was protected by general laws and remained unaffected even though not mentioned in the grant.

Sometimes, however, it received special recognition and protection in the terms of the instrument itself. So in *United States v. Arredondo*, 6 Pet. 691, 693, "said grant is also understood to be made without prejudice to a third party, and especially to the Indians, natives of that land who may have returned or may intend to return to make there their plantations." Similarly, in *United States v. Armijo*, 5 Wall. 444, 447, "one of the conditions annexed to the grant provided that on no account should the grantee molest the Indians, nor his immediate neighbors." In like manner, in the case at bar, the grant provides that the grantees "must not interfere with (impediran) the cultivation and other advantages which

the Indians who are found established in said place have always enjoyed.” (Complaint, Paragraphs VI, VII.)

The map submitted by the petitioners for this grant shows sundry Indian rancherías, so that this is an official assertion that the Indians were already established on the granted premises and were cultivating them; but it is unnecessary to rely on this, since these facts are stated in the complaint and admitted by the motion to dismiss.

The Court will observe that the Tejon Indian title does not rest solely, or even primarily, on this protective condition in the expediente. It rests on two grounds: (1) its status as an original right acknowledged and admitted by a uniform series of general enactments of Spain and Mexico; (2) its specific recognition in the grant as an existing right, non-interference with which is made a condition of the grant itself.

At the time of the treaty of Guadalupe Hidalgo, therefore, the Tejon Indian title, thus generally acknowledged and specially fortified, was as clear, definite and sacred as any property right existing in Mexico.

2. By the treaty of Guadalupe Hidalgo the United States contracted to preserve and protect all existing rights of property recognized by Mexico, including the foregoing title and right possessed by the Tejon Indians at the date of that treaty.

Article VIII, Article IX, and Paragraph 2d of the protocol of this treaty (7 Fed. Stat. Ann., pp.

696, 698, 703), amply protect existing Mexican property rights of every description. They are too long for quotation here. Article VIII provides that Mexicans in the ceded territories might remain where they were, "retaining the property which they possess in the ceded territories." Article IX provides that in proper time they should become citizens of the United States, "and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property." The protocol states that "conformably to the laws of the United States legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May, 1846." It will be recalled that under the plan of Iguala of 1821, and subsequent Mexican enactments confirmatory thereof (cited above), Indians were made Mexican citizens. So it is directly held in *United States v. Ritchie*, 58 U. S. 539. The references to Mexicans in the treaty, therefore, necessarily include Indians.

The liberal spirit in which the United States has interpreted these requirements and the fact that the Indian title is covered by them can be established by a few quotations.

"The United States have never sought by their legislation to evade the obligation devolved on them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory or to discharge it in a narrow and illiberal manner. They have directed their tribunals, in pass-

ing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, **the law of nations, the laws, usages and customs of the former government,** and the decisions of the Supreme Court, so far as they are applicable. * * * They have desired to act as a great nation not seeking in extending their authority over the ceded country to enforce forfeitures, but to afford protection and security **to all just rights which could have been claimed from the government they superseded."**

United States v. Auguisola, 1 Wall. 352, 358.

Speaking of the Act of 1851, passed to define and secure the rights covered by the same treaty, the same Court says:

"It (the Act) recognizes alike legal and equitable rights and should be administered in a large and liberal spirit. **A right of any validity before the cession was equally valid afterwards."**

United States v. Moreno, 1 Wall. 400, 404.

"Such acquisition (of California) did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection in them **to the same extent as under the former government.** The treaty of cession also **stipulated for such protection."**

Beard v. Federy, 3 Wall. 478, 491.

"When the United States acquired California the inhabitants were entitled by the law of nations to protection from the new Government **in all rights of property then possessed by them.** * * * Their ownership remained as under the former Govern-

ment and by the term 'property' as applied to land **all titles are included, legal or equitable, perfect or imperfect.** 'It comprehends,' as said by this Court in *Soulard v. United States* 4 Pet. 511, 512, **'every species of title, inchoate or complete.'** * * * In this respect the relation of the inhabitants to their government is not changed."

Knight v. Land Association, 142 U. S. 161, 201.

The protection of the treaty applies "whether the party had the full and absolute ownership of the land, **or merely an equitable interest therein which required some further act of the Government to vest in him a perfect title.**"

Astiazaran v. Mining Co., 148 U. S. 80, 81.

"In harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; **that which was good before should be enforceable after the cession.**

Ely's Administrator v. United States, 171 U. S. 220, 223.

To the same effect, see:

Strother v. Lucas, 12 Pet. 410, 438.

Leitensdorfer v. Webb, 20 How. 176, 177.

Palmer v. Low, 98 U. S. 1, 15.

Brownsville v. Cavazos, 100 U. S. 138, 143.

Botiller v. Dominguez, 130 U. S. 238, 243.

United States v. Chaves, 159 U. S. 452, 457-8.

The language of the above opinions clearly includes the Indian title; and indeed in *Barker v. Har-*

vey, 181 U. S. 481, 486-7, the sole case relied on by appellees, the Court, quoting from the Astiazaran case, *supra*, admits that an Indian possessory title fell within the class which the United States by the treaty undertook to respect, although on other grounds presently to be distinguished it rejected the Indian claim there presented.

No further demonstration under this head seems necessary.

3. This Indian title presented no novelty under American law, nor was there anything inconsistent with that law in the undertaking by the United States to protect it, because before and at that time and at all times in the history of our jurisprudence the law of the United States was and still is practically identical with that of Spain and Mexico in this regard, viz.: That Indians have an original right and title of occupancy, possession and use prior to the right or title of Spain, Mexico or the United States, which can be extinguished only by the sovereign and which until so extinguished is as sacred as the sovereign title or the fee title.

The case at bar presents none of the difficulties which sometimes arise after a cession of territory when the laws of the previous sovereignty are at variance with those of the new. The Indian possessory title, recognized by all the nations participating in the discovery and conquest of the Americas, was acknowledged in the same manner and to the same extent by the United States from the time of its establishment as an independent nation down to the present. This principle is so familiar that two or

three authoritative statements of it will suffice. Decisions to be hereafter quoted as to various incidents of this title will further illustrate the general rule.

Johnson v. McIntosh, 8 Wheat. 542, decided by Chief Justice Marshall in 1823, is a leading case, repeatedly cited and relied on. The Court announces and explains at great length the doctrine that discovery of the Americas by Europeans was construed as giving title to the discovering nation as against all other European nations, and the sole right of acquiring the possessory title from the natives. He points out that this possessory title was uniformly recognized by Spain, France, Great Britain and the American colonies, and, referring to the above principle, says:

“The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country.” (p. 587.)

“It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete, ultimate title, charged with this right of possession and to the exclusive power of acquiring that right.” (p. 603.)

See also pp. 543, 574.

In speaking of recognition by Spain in Florida of the Indian right as formerly acknowledged by Great Britain, it is said:

“This right was occupancy and perpetual possession **either by cultivation or as hunting grounds**

which was held sacred by the Crown, the Colonies, the States and the United States.”

Mitchel v. United States, 9 Pet. 711, 752.

“The United States held the ultimate title charged with the right of undisturbed occupancy and perpetual possession in the Indian nation with the exclusive power in the Government of acquiring that right.”

Doe v. Wilson, 64 U. S. 457, 463.

“Indians have rights of occupancy to their lands as sacred as the fee simple absolute title of the whites.”

Cherokee Nation v. Georgia, 5 Pet. 1, 48.

“The right of the Indians to their occupancy is as sacred as that of the United States to the fee.”

United States v. Cook, 86 U. S. 591, 593.

Quotations could be multiplied without limit. Reference may be made to the following specimen cases:

Worcester v. Georgia, 6 Pet. 516, 579, 584.

Mitchel v. United States, 15 Pet. 52, 83.

Marsh v. Brooks 8 How. 223, 232.

Gaines v. Nicholson, 9 How. 356, 364.

Fellows v. Blacksmith, 60 U. S. 366, 371-72.

Holden v. Joy, 84 U. S. 211, 243-45.

Beecher v. Wetherby, 95 U. S. 517, 526.

Buttz v. Northern Pac. Ry., 119 U. S. 55.

Lone Wolf v. Hitchcock, 187 U. S. 553, 564.

4. Some incidents of this Indian title relevant to the situation in the case at bar may be briefly mentioned.

(a) **The Indian title is both legal and equitable in its nature and has been variously likened to an easement, life estate, trust or use with which the fee is charged.**

The following are some of the passages in which the Supreme Court has mentioned its qualities:

“They (the aborigines) were admitted to be the rightful occupants of the soil **with a legal as well as just claim** to retain possession of it and to use it according to their discretion.”

Johnson v. McIntosh, 8 Wheat. 542, 574.

“That an action of ejectment could be maintained on an Indian right to occupancy and use is not open to question. This is the result of the decision in Johnson v. McIntosh, 8 Wheat. 574 (see p. 592), and was the question directly decided in the case of Cornet v. Winton, 2 Yerg. (Tenn.), 143.”

Marsh v. Brooks, 49 U. S. 223, 232.

“A tenant for life has all the rights of occupancy in the lands of a remainder man. **The Indians have the same rights** in the lands of their reservations.”

United States v. Cook, 86 U. S. 591, 594.

“The fee was in the United States. The Indians had merely a right of occupancy, **a right to use** the land subject to the dominion and control of the Government. * * * The discoverers recognized a right of occupancy or **a usufructuary right** in the natives.”

Buttz v. Nor. Pac. Ry., 119 U. S. 55, 66-7.

Where Indians conveyed land with the assent of the United States to an individual, but reserved the

right to fish and hunt on the granted premises, as a portion of their original right of occupancy and use, the Court says:

“We assume that they retained **an easement or profit a prendre** to the extent defined; that is not questioned.”

Kennedy v. Becker, 241 U. S. 556, 562.

See also United States v. Wynans, 198 U. S. 371, 384.

We have sought in vain for any more exact definition or classification of the Indian title. It resembles an easement in being a burden or charge on the land, but differs in that it is not created either by grant or by prescription, and involves a fuller enjoyment of the premises than that included in any known easement. It resembles the interest of the life tenant as against the remainder man in the extent of use to which the land may be put, but differs in that it is not freely alienable, and that it does not endure for any designated life or lives, but, unless acquired by the government, for the tribal life; i. e., throughout the successive generations through which the tribe endures. It is not a leasehold since there is no rent, no contract of tenancy, no term, and since the Indians hold **under** the United States, but not **from** it. Nor is it an estate at will or by sufferance, since in the former the tenant enters by permission of the lessor and holds from him, and in the latter holds over with no title at all, while here the Indian title, as above shown, is original and not created by the United States. Neither is it a license since a licensee has no permanent interest and indeed no estate what-

ever. That it is a legal estate of some sort, however, to be respected both by the United States and its grantees has been plainly established above.

But the Indian title possesses equitable attributes as well. *Johnson v. McIntosh*, *supra*, describes it as “a legal as well as a just claim;” i. e., resting not only in law but in equity and good conscience. Indians in general are, and the Tejon Indians are especially described in the complaint as being, incompetent to manage their own affairs, and wards of the United States. The latter holds the fee and the sole power to acquire or extinguish the Indian possession, but if it does either, will in so doing resemble a guardian acquiring or extinguishing the title of his ward, which ward is so peculiarly situated as to have no legal protection or redress against the guardian. This is a condition appealing cogently to equity and good faith, although, as against the sovereign, the Indian title is beyond the protection of the courts. But when the fee passes from the government into private hands, the situation is different. The fee, which ordinarily would carry full right of possession and use, is for the time being only a naked fee. The private grantee has the title, but the Indians have the beneficial use until the sovereign which alone has the power to interfere, extinguishes such use. The sovereign conveys the fee with the understanding, express or implied in law, that the Indian possession and use will be undisturbed by the grantee. It is, therefore, a species of lien or trust with which the fee is charged.

“A trust has been * * * defined as * * *

an equitable right, title or interest in property distinct from the legal ownership thereof. * * * It implies two estates or interests, one equitable and one legal, and is said to exist where property is conferred upon and accepted by one person on terms of holding * * * it for the benefit of another * * * or where there are rights, titles and interests in property distinct from the legal ownership.”

39 Cyc. 17, 18.

Jones v. Byrne, 149 Fed. 457, 463.

“A trust is where there are rights, titles and interests in property distinct from the legal ownership. In such cases the legal title in the eye of the law carries with it to the holder absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights to the extent to which they exist are a charge upon the property and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked.”

Seymour v. Freer, 75 U. S. 202, 213.

Corbin v. Holmes, 154 Fed. 593, 604.

It is clear that the Indian title comes within the scope of the above definitions. The government, occupying a fiduciary relation to the Indians and their title, passes the fee to a private grantee with the understanding, either implied in law or, as in this case, expressed in terms, that the latter will respect and protect the Indian right. This creates a resulting trust with the grantee as passive trustee. If he violates that trust, as the complaint here alleges to have been the case, a constructive trust or trust *ex maleficio* also arises.

The Indian title appears,, therefore, to be **sui generis**. It is not essential here to classify it exactly. It is necessary only to bear in mind, as has been above demonstrated, that it has both a legal and an equitable side, and that in either aspect it is a charge or use to which the fee title is subject.

(b) **The Indian title is not extinguished by a mere grant in fee by the sovereign; and in the case at bar was further and expressly protected by the terms of the instrument conveying the fee.**

We will here foreclose any contention that a patent or grant from the United States to land in Indian possession necessarily or at all passes the fee free from the Indian title. That a title of its quality, attributes and dignity could not be thus casually or inferentially obliterated is clear in the nature of things, and is shown by many decisions of the Supreme Court. Such was the law under Spain and Mexico and such is the law of the United States. Thus in *Johnson v. McIntosh*, 8 Wheat. 543, 574, the Court, speaking of the European nations which discovered different portions of America, says that they “claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantee subject only to the Indian right of occupancy.”

In *United States v. Arredondo*, 6 Pet. 691, a grantee of Spain whose grant contained a provision that it was to be made without prejudice to Indians (p. 693) petitioned for a confirmation of title as against the United States. The latter claimed,

among other things, that the grant was in fact made with prejudice to the Indians, and that in such event under the laws of Spain, the land was to be returned to its lawful owners. In this particular, the case turned upon an inquiry whether or not the Indians had in fact abandoned the land, but the Court in its general discussion says

“Thus a grant, even by Act of Parliament, which conveys a title good against the King, takes away no right of property from any other; **though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land.**” (p. 738.)

Speaking of grants made by Great Britain and later by Spain of land in the Indian country in Florida, the Court says:

“Both made grants without regard to the land being in the possession of the Indians; **they were valid to pass the right of the Crown subject to their rights of occupancy**; when that ceased either by grant to individuals with the consent of the local governors, by cession to the Crown, or the abandonment of the Indians, the title of the grantee became complete.”

United States v. Fernandez, 10 Pet. 303, 305.

“**Grant to individuals**” in this passage means, of course, grant by the Indians of their title to individuals, a practice recognized by Spain in case the local governor approved, as stated in *Chouteau v. Moloney*, 16 How. 203, 236-7.

In the last mentioned case (p. 239), it is said:

“It is not meant by what has just been said that the Spanish governors could not relinquish the interest or title of the Crown in Indian lands and for more than a mile square, **but when that was done the grants were made subject to the rights of Indian occupancy.** They would not take effect until that occupancy had ceased and whilst it continued it was not in the power of the Spanish Governor to authorize anyone to interfere with it.”

Coming to the principle adopted by the United States in similar situations,—where Congress had made a grant to a railway of designated lands to which “The United States have full title not reserved, sold, granted or otherwise appropriated and free from prescription or other claims or rights,” with an undertaking to extinguish the Indian title to any lands affected, the Court says:

“At the time the Act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the lands to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the Government. **The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance.** The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it.”

Quoting, with approval, from *Clark v. Smith*, 13 Pet. 195, 201, the opinion continues:

“The ultimate fee (incumbered with the Indian right of occupancy) was in the Crown previous to the Revolution and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power and respected by the courts until extinguished; **when the patentee took the unincumbered fee.** So this court and the State Courts have uniformly and often holden.”

Buttz v. No. Pac. R. R., 119 U. S. 55, 66, 68.

“The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the 200 feet as a right of way to the Company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the Government, and when transferred **without reference to the possession of the lands and without designation of any use of them, requiring the delivery of the possession, the transfer was subject to their right of occupancy.** * * * This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions.”

M. K. & T. Ry. v. Roberts, 151 U. S. 114, 116.

To the same effect, see:

Fletcher v. Peck, 6 Cranch. 87, 142.

Johnson v. McIntosh, 8 Wheat. 543, 590.

Mitchel v. United States, 9 Pet. 711, 745.

Marsh v. Brooks, 8 How. 223, 232.

Beecher v. Wetherby, 95 U. S. 517, 525-6.

Wisconsin v. Hitchcock, 201 U. S. 202, 213-14.

Of course the case at bar is a clearer instance of the application of this principle than most of those cited because, when the fee passed from the sovereign, the latter expressly stipulated in the grant for the protection of the Indian possession (Comp., Pars. VI, VII), and the United States when it confirmed the grant expressly excepted outstanding rights not inconsistent with the transfer of the fee.

(c) **The Indian title is extinguished only by words or acts distinctly indicating such purpose, of which there have been none in this case on the part of Mexico or the United States; and in the history of the United States has usually been abrogated by treaty and always on some terms of compensation to the Indians. There has been no compensation here.**

This proposition is a necessary correlary of (b) above. Since the Indian title is unaffected by a mere grant of the fee even by Act of Congress, and since, nevertheless, the government has authority to extinguish it, such intent to extinguish must be unmistakably shown. Otherwise, the Indian title continues in unimpaired efficacy. Such is the effect of the cases cited under (b).

For example, in *Worcester v. Georgia*, 6 Pet. 515, the Court thus describes the law prevailing when the Cherokee country was in British hands.

“The King purchased their land when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them.” (p. 547.)

This principle prevailed down to and after the Revolutionary War (pp. 548-9) and was adopted by the United States (pp. 552, 579).

In *Leavenworth, etc., R. R. Co. v. United States*, 92 U. S. 733, which is mainly concerned with the construction of ambiguous or conflicting Acts of Congress which raised a doubt whether or not certain lands within the Osage territory were included within a railroad land grant, the Court, after reiterating the doctrine of the early cases that the Indian title could not be extinguished except by a voluntary cession, and that meanwhile it was "as sacred as the title of the United States to the fee," continues:

"This perpetual right of occupancy with the correlative obligation of the Government to enforce it **negatives the idea that Congress, even in the absence of any positive stipulation to protect the Osages, intended to grant their land to a railroad company.**" (p. 742.)

And again:

"If Congress really meant that this grant should include any part of the reservation of the Osages, it would at least have secured **an adequate indemnity to them**" (p. 774),
with much more to the same effect.

In *Missouri, etc., Ry. Co. v. Roberts*, 152 U. S. 114, where a grant of a railway right of way involved land occupied by Indians, the Court, in a passage already quoted, states that a conveyance by the United States of the fee without designating any use requiring the delivery of possession, leaves the Indian title unimpaired, but concludes that in the case before it,

since the grant of a right of way necessarily involved the use and occupancy thereof by the Railway Company, this amounted to a definite expression of intention to extinguish the Indian title; although not so under “grants of the Government **not indicating its intention, either in express terms or by the uses to which the lands are to be applied**, to change the possession of the lands.” (p. 118.)

In *United States v. Wynans*, 198 U. S. 371, where the Indians in a treaty with the United States had reserved hunting rights over land to which the United States subsequently gave a patent, the Court, after pointing out that the hunting right was **part of the original Indian title** and was not a creature of the treaty, says:

“It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty, as to the other laws of the land.” (pp. 381-2.)

A clear expression of both elements of the doctrine above stated is found in the concurring opinion of Mr. Justice McLean in *Worcester v. Georgia*, 6 Pet. 515, 580, viz.:

“The occupancy of their (the Indians’) lands was never assumed **except upon the basis of contract and upon the payment of a valuable consideration**. This policy has obtained from the earliest white settlements in this country down to the present time.”

To the same effect, is *Minnesota v. Hitchcock*, 185 U. S. 373, 389.

In case it should be contended that a different

rule applies to land reserved to Indians under a treaty or by other governmental action than to lands merely subject to their original occupancy, *Spalding v. Chandler*, 160 U. S. 394, 403, states the principle to be the same in both cases.

“The Indian title, as against the United States, was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. **When Indian reservations were created, either by treaty or executive order the Indians held the land by the same character of title.**”

That it has been the policy of the Government throughout not to extinguish the Indian title in any casual or silent way, but expressly to recognize and acquire it is shown by the long series of treaties with Indian tribes from the earliest times until a different mode of safeguarding their rights was provided. This is part of the history of our country of which the Court will take judicial notice. Examples of such treaties will be found in most of the cases cited, as well as in many hereafter mentioned. The *Hot Springs* cases, 92 U. S. 698, 703-4; *Leavenworth*, etc., *R. R. Co. v. United States*, 92 U. S. 733, 734-5, 741, and *Buttz v. Nor. Pac. R. R.*, 119 U. S. 55, 59, 60, 69, may be instanced merely as examples out of a great number

In view of the foregoing, it is hardly necessary to point out that the Indian title is not and cannot be extinguished against their will by private violence and aggression. This was true under the laws of

Spain. In interpreting a grant made subject to Indian occupancy, the Court says:

“The fact of abandonment was the important one to be ascertained; if voluntary the dominion of the Crown over it was unimpaired in its plenitude; if by force the Indians had the right, whenever they had the power or inclination, to return.”

United States v. Arredondo, 6 Pet. 689, 747.

It is also true under the laws of the United States. In *Fellows v. Blacksmith*, 60 U. S. 366, 371, Fellows was a beneficiary under a treaty between the United States and the Seneca Indians of New York which acknowledged that he had acquired the Indian title as well as the original Colonial title to a specified tract, and which provided that within a specified time the Indians should be removed by the United States and the tract surrendered to Fellows. The United States did not remove the Indians within the time fixed, whereupon Fellows ejected them by force. In sustaining an action in trespass brought by an Indian against Fellows, the Court, after calling attention to the pupilage of the Indians, says:

“It is difficult to believe that it could have been intended by the Government that these people were to be left after they had parted with the title to their homes to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of a Court of Justice.”

This holding is based not only upon the language of the treaty, but upon “the fitness and propriety of the thing itself.” (p. 372.)

If this be true where the Indians have voluntarily ceded their rights, **a fortiori**, must it be true where they have always claimed those rights and still maintain and enjoy them except in so far as they have been unable to resist the lawless violence of defendants.

The propositions stated as (b) and (c) above have been recently upheld by this court, in exact accord with the cases above cited, in *Cramer v. United States*, 276 Fed. 78.

Up to this point the matters advanced are recognized principles of law, established by repeated decisions of the Supreme Court. We have, therefore, demonstrated them by conclusive citations, without unnecessary discussion. They are fundamental to our case as showing the nature, dignity, incidents and obligation of the Indian title, when the Act of March 3, 1851, was passed, when *Barker v. Harvey* was decided, and at the present time. It will be shown to follow not only that the lower Court was wrong in its construction of said Act with reference to a title of this kind, but that the dicta in *Barker v. Harvey*, if found applicable to this case at all, are erroneous, as being inconsistent with and contradictory of principles embodied in a long line of decisions by the same Court.

The foregoing presentation of the Indian title, therefore, has been made at a length which might seem unnecessary had not the acceptance by the District Court of *Barker v. Harvey* as controlling made it necessary to prove beyond question the incidents of the title inconsistent with that decision.

5. The Act of March 3, 1851 (9 Stat. L. 631), not only does not require tribal Indians to appear before the Commission created by that Act, there to assert their right to occupancy under penalty of losing it by non-appearance, but distinctly shows a contrary intent. The affirmative action it requires is not by the Indians but by the Commission, which is instructed to investigate that right or title and given power to report thereon but not to adjudicate.

When the United States acquired California in 1848 by the Treaty of Guadalupe Hidalgo, it is a matter of common knowledge that a great number of tracts of land had already been segregated from the public domain and granted to private persons by the governments of Spain and Mexico. Many of these were of vast and indeterminate extent; few, if any, were surveyed; their limiting monuments were often difficult or impossible to identify, and a number were suspected to be fraudulent. The General Land Office map of California issued in 1913 gives a list of 553 of these grants, and William Carey Jones, the Special Commissioner appointed in 1849 by the Secretary of the Interior to investigate conditions in California, enumerates 594.

It is equally a matter of history that the aboriginal Indians were still living in large numbers everywhere throughout California on granted and ungranted land alike. Meanwhile a tide of population was rapidly occupying the new territory and it was obviously and pressingly necessary to ascertain what portion of it was private property and what was public domain to which the general system of land laws might be applied.

The difficulty in applying that system lay in the large numbers, vast acreage, unsettled boundaries, and uncertain validity of these Spanish and Mexican grants, and when Congress commenced to clear the way by the Act of 1851, the grant situation was necessarily uppermost in its mind.

“The Act of March 3, 1851, * * * contemplated primarily nothing more than the separation of the lands which were owned by individuals from the public domain.”

U. S. v. Morillo, 68 U. S. 707, 709.

“The Board of Commissioners was instituted by Congress to obtain a prompt decision on the validity of private land claims, to enable the government to distinguish the public land from that which had been severed from the public domain by Mexico.”

U. S. v. Fossat, 61 U. S. 413, 425.

To the same effect, see:

Meader v. Norton, 78 U. S. 442, 457.

Thompson v. Farming Company, 180 U. S. 72, 77.

Botiller v. Dominguez, 130 U. S. 238, 244, 249.

Not that Congress ignored the Indian situation; in Section 16 presently to be examined it separately and specially instructed the Commission in effect to ascertain what the Indian title was and to report whether it presented any special features under the foreign laws theretofore applicable. But our point here is that whether we survey the remainder of the Act generally or examine it minutely, we find it con-

templates solely the presentation to the Commission of such formal titles as arose from or depended on **definite grants or concessions from the former governments to private persons**, effective in segregating the granted tracts from the public domain. It unmistakably does not contemplate the tribal Indian title of occupancy, which did not rest in grant and which, alike in Spanish, Mexican and United States law, attached as an easement or trust equally to granted and ungranted land until extinguished by affirmative governmental action.

(a) A general survey of the Act of 1851 as a whole is as convincing in this behalf as any argument can be.

The intention of any legislative enactment is primarily to be ascertained from a view of the statute as a whole.

Kohlsaat v. Murphy, 96 U. S. 153, 159.

Pennington v. Coxe, 2 Cranch. 33, 52.

Gayler v. Wilder, 10 How. 477, 496.

Heydenfeldt v. Mining Co., 93 U. S. 634,
638.

We respectfully request the Court to read the Act, since it is far too long for quotation here. Upon so doing, the Court's impression cannot fail to be that Congress had in mind a scrutiny of formal titles, regularly deraigned, derived from the former sovereignties, presumably to be upheld by documentary evidence, capable of culminating in a United States patent, negating the continued existence of any governmental title and presented by claimants *sui juris*, competent to litigate cases, take notice of stat-

utes of limitation, and prosecute appeals. Clearly such titles are not the tribal Indian title of occupancy nor are these claimants the slightly civilized or totally ignorant tribes of California Indians who had just become wards of the government. In other words, when Congress says in the preamble, that the Act was “for the purpose of ascertaining and settling private land claims in the State of California,” it means exactly what was then, and always has been the common meaning of “private land claims,” viz., the claims of private individuals either to actual grants in fee from the former sovereignties, or to initiated but incomplete titles, capable of ripening into the fee title,—either sort involving the distinction between public and private land.

We are speaking here of the general impression produced by a perusal of the Act as a whole. This must needs speak for itself and make its own mark on the mind of the Court. Discussion on our part would be irrelevant. We confidently submit that the Court’s conclusion must needs be that the claims contemplated were what are commonly called Spanish and Mexican grants and not any tribal or informal Indian title. This was all that was necessary to satisfy the recognized purpose of the legislation, to distinguish what still was public domain from what was not.

(b) A detailed examination of the Act confirms point after point the impression given by a general view.

We pass with a mere mention a slight but significant word in the title, which reads, “An Act to

Ascertain and Settle **the** Private Land Claims, in the State of California”—obviously meaning in the common use of language **the** set of private land claims that everyone knew of and was then talking about—**the** private land claims which necessitated the passing of the Act—**the** Mexican grants which rendered the limits of the public domain so uncertain.

We note but do not dwell on the fact that Section 2 requires the appointment of a Secretary, “skilled in the **Spanish** and **English** languages * * * whose duty it shall be to act as interpreter,” and that Section 4 authorizes the appointment of “an agent learned in the law, and skilled in the **Spanish** and **English** languages” to collect evidence for the United States and to be present on its behalf at the taking of all depositions and testimony by claimants.” Depositions were not admissible unless he had been given opportunity to attend.

Clearly it was anticipated that the commission would deal with Spanish-speaking claimants and grantees, and that Spanish was the other language besides English in which testimony was expected. Yet California was populated by thousands of Indians, speaking their various languages and occupying much of their original territory on plains and mountains. Certainly they did not all speak Spanish. If Congress intended to require all these primitive and helpless people to appear and maintain their right of occupancy, ordinary fairness would have dictated some arrangement whereby interpreters skilled in their languages could be engaged and paid

as occasion arose. Yet there is no provision in the Act for interpreters except as above cited. The natural inference is that Congress had in mind such claimants only as had become sufficiently Mexicanized to apply for and obtain land grants and whose knowledge of Spanish might reasonably be presumed.

We do not emphasize these points. They are merely straws which show the way the Congressional wind blew.

(c) Section 8, however, defines the class of persons contemplated by the Act and the nature of their land claims in plain language which **absolutely and necessarily excludes the Indians and their right or title.**

“And be it further enacted that each and every person claiming lands in California **by virtue of any right or title derived from the Spanish or Mexican government,** shall present the same to the said commissioners when sitting as a board.”

Titles so derived alone are within the scope of the Act. But the Indian title was not so derived. The Act therefore did not require its presentation.

That the Indian right is original and not derived from Spain, Mexico or any sovereignty has already been briefly indicated under 1 (a) *supra*. That it is a surviving element of an original and absolute ownership of the soil prior to European conquest, or in other words an exception from the absolute domain and ownership claimed by the conquerors, and not a mere license to enjoy a possessory right granted by

the conquerors after a total obliteration of the original Indian ownership, is clear in the nature of things, was so regarded by Spain and Mexico, and has been established by decisions of our own Supreme Court.

The Indians had complete dominion and full possession when the Spaniards arrived; under the bull of Pope Alexander VI, and by right of conquest, the dominion, including the right to acquire or extinguish the possessory title, passed to Spain; but the actual possession, although impaired by **vis major**, was never entirely destroyed, and where it persisted was recognized and the right to extinguish it expressly waived by a myriad of enactments of which a few specimens have been quoted. In the case at bar the original possession of the Indian tract by the Indians remained undisturbed during the entire period of Spanish and Mexican sovereignty.

That this Indian title was recognized as original and not derivative is also seen from the language of the Spanish laws quoted under (1) *supra*. "To the Indians should be **left** their lands, cultivated ground and pastures"; the sale of land shall be so made "that the Indians shall be **left** with, above all, **what lands shall belong to them** * * *, and the waters and places of irrigation"; the lands which their industry has fertilized "**shall be reserved** in the first place and in no case can they be sold or alienated"; "that they keep them (their lands) **as they have held them previously**"; "the Indians who possess lands within the limits of the government **shall not in any manner be disturbed.**"

These considerations are mentioned without being stressed for the reason that the fact that the Indian possessory title is a surviving element of their original complete title is established by repeated decisions of the Supreme Court of the United States.

“The rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. **They were admitted to be the rightful occupants of the soil with a legal, as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty * * * were necessarily diminished * * *. While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves.**”

Johnson v. McIntosh, 8 Wheat. 543, 574.

“The absolute ultimate title has been considered as acquired by discovery, **subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.**”

Ibid., p. 592.

“The Indians are acknowledged to have an unquestionable * * * right to the lands they occupy until that right shall be extinguished by a **voluntary cession to our Government.**”

Cherokee Nation v. Georgia, 5 Pet. 1, 17.

“It (the principle that discovery gave title) regulated the right given by discovery among the European discoverers; but **could not affect the rights of those already in possession, either as original occupants, or as occupants by virtue of a discovery made**

before the memory of man. It gave an exclusive right to purchase, **but did not found that right on a denial of the right of the possessor to sell.**"

Worcester v. Georgia, 6 Pet. 515, 544.

"The Indian nations have always been considered as distinct, independent, political communities, **retaining their original natural rights as the undisputed possessors of the soil from time immemorial.**"

Ibid., p. 559.

Where Indians ceded certain territory to the United States, but the latter in the same transaction allowed a reservation of certain sections to designated Indians, the Court says:

"It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but **under his original title** confirmed by the Government in the act of agreeing to the reservation."

Gaines v. Nicholson, 9 How. 356, 365.

"Spain at all times, or from a very early date, **acknowledged the Indians' right of occupancy** in these lands, but at no time were they permitted to sell them without the consent of the King."

Chouteau v. Moloney, 16 How. 203, 228.

"It is a fact in the case that the Indian title to the country had not been **extinguished** by Spain, and that **Spain had not the right of occupancy.** The Indians had the right to continue it as long as they pleased."

Ibid., p. 237.

“Beyond doubt, the Cherokees were the owners and occupants of the territory where they resided before the first approach of civilized man to the Western continent, deriving their title, as they claimed, from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory. * * * Throughout, the Indians, as tribes or nations, have been considered as distinct, independent communities, retaining their original natural rights as the undisputed possessors of the soil from time immemorial. * * * Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successor of Great Britain.”

Holden v. Joy, 84 U. S. 211, 243-4.

See also

Mitchel v. United States, 9 Pet. 711, 752.

Doe v. Wilson, 64 U. S. 457, 463.

Wisconsin v. Hitchcock, 201 U. S. 202, 214.

Dick v. United States, 208 U. S. 340, 359.

The foregoing quotations may seem needlessly numerous, although it would be easy to double the number of similar passages from Supreme Court decisions and increase ten-fold those from the laws of Spain, later carried over into the laws of Mexico. The point, however, is fundamental, and it is worth while to establish it beyond a peradventure.

We do not see how anything could be clearer. Not only do the earlier sovereignties by their own laws recognize the Indian title as original and not derivative, but our Court of last resort has authori-

tatively so stated. Nor could it be otherwise, since the Indians were there when the conquerors came, and remained there continuously, still holding part of what they had held before. Their title might be, and was, **recognized or acknowledged** by the new governments, but it was **derived** from original and immemorial possession or as the Supreme Court suggests in *Holden v. Joy*, **supra**, from the Great Spirit.

The Mexican and Spanish grant titles were **derived** from those governments; the Indian occupancy title was not. The former, therefore, or any title emanating from those governments, had to be presented to the Commission; the Indians and their title were outside the scope of the Act.

Section 8, therefore, by itself alone, conclusively shows that Indians were not within the contemplation of Congress at all, except for the purpose later indicated in Section 16. Congress is presumed to have known the law to be as repeatedly announced by the Supreme Court, that the Indian title was not derivative. When, therefore, it required claimants under derivative titles only to present them, it definitely excepted the aboriginal title from its requirement. In *Barker v. Harvey*, 181 U. S. 481, 491, there is a mention of Section 8 couched in language far from clear but apparently indicating that the claim then before the Court was urged not on the basis of the aboriginal Indian title but as founded on the provision for Indian protection embodied in one of the Mexican grants involved. This will be discussed later in our analysis of the *Barker* case. It will be

found, however, that that opinion nowhere controverts any of the foregoing arguments nor asserts that the general Indian title, such as we primarily rely on, was derivative. It could not do so without contradicting a long line of decisions of the same Court. And if the Indian title was not derivative, it was not required to be submitted.

(d) Passing on, we note, but do not dwell on, other subordinate indications that the purpose of Congress was to deal with formal grants and not general and aboriginal titles not resting in grant nor evidenced by writings.

The same Section 8 requires the claimant to present his claim, "together with such **documentary evidence** and testimony of witnesses, as the said claimant relies on in support of such claims."

Section 9 requires that the petition of a defeated claimant on appeal "shall set forth fully the nature of the claim, and the names of the **original and present claimants**, and shall contain a **deraiment of the claimant's title**, together with a transcript of the report of the board of commissioners and of the **documentary evidence** and testimony of the witnesses on which it was founded"—with more to the like effect.

Of course, these passages by themselves are not conclusive, but they are significant and persuasive. What documentary evidence could Indians produce at the hearing and what deraignment or formal showing of their title could they make in a petition on appeal—unless, perhaps, a deraignment from the

Great Spirit, as suggested in *Holden v. Joy*, *supra*. How could they set forth the names of the “original claimants”—unless by identifying their ancestors born of the legendary marriage of the sun and the moon, or first created by the Manitou on the plains and hills which they had possessed ever since. No one can read these passages without concluding that Congress in enacting them, had in mind the holders of formal titles evidenced by the regular expediente—the petition to the governor, the reference of the petition for a report thereon, the report, the grant and the confirmation; and such title holders individuals, not tribes. No one can suppose that Congress, if it had intended Indians to appear before the Commission, would not have used language appropriate to include their unwritten, peculiar and non-derivative title.

(e) When we come to Section 13, we find a requirement which, like the limitation in Section 8, is **absolutely impossible of reconciliation** with the theory that the Act contemplated Indians among the proponents of claims. It reads:

“And be it further enacted that * * * for all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, **a patent shall issue to the claimant** upon his presenting to the General Land Office an authentic certificate of such confirmation.”

If, as our opponents contend, the Act required all Indians to present their occupancy title for confirmation under penalty of losing it, it must have contemplated that such title might on proper showing

be upheld and confirmed like any other. Whenever, then, the occupancy title upon proof of its existence and continuity was established, under Section 13, “a patent **shall** issue to the claimant.” The language is not permissive but imperative.

But who ever heard of a United States patent conveying to an Indian tribe an occupancy title? This title as already noticed [4 (a) **supra**], is in the nature of an easement or trust with which the fee title is charged, or of a possessory title held by a life tenant against the remainder man. Who ever heard of a United States patent conveying to any grantee such a title, or conveying anything but the fee title? Such fee may be held in trust or may be subject to a use or easement, but it is always the fee that is conveyed. In the case at bar, as in very many cases, Indians were in occupation of part of a grant. If they had come before the Commission and made proof of immemorial occupancy, would the General Land Office have been obliged to give a patent to them and another patent to the same land to the Mexican grantees? No conclusion can be reached under this theory which is not preposterous. The truth is that it is the theory itself that is preposterous. Abandon the astonishing and barbarous idea that Congress meant to say that child-like aborigines, **non sui juris**, incompetent to manage their own affairs, wards of the United States and under its protection, were to be charged with knowledge of the Act and its requirements, were to travel from all quarters of the State of California to San Francisco and there present evidence acceptable to a white man’s court of their possessory title, under penalty of being turned

homeless and resourceless upon the world; give the act its obvious application to those who were sufficiently alert to have already obtained grants or similar rights from the former governments; and the whole measure becomes a fair, consistent and reasonable enactment. The other theory attributes to Congress the perpetration of a cynical and inhuman travesty of justice and a substantial and flagrant violation of a treaty just concluded, which at the same time was so clumsily conceived that any Indians who might chance to learn of the attempted robbery and prove their possession would receive the unheard-of grace of a United States patent for an occupancy title, fixing that title as a charge forever upon the fee, whether vested in a Mexican grantee who might also receive a patent to the same land, or whether remaining in the United States. In other words Congress was gambling on whether the Indians would or would not learn of the Act and appear before the Commission. If they did not, the guardian would succeed under form of law in cheating its helpless wards out of an ancestral right which had been solemnly pronounced as sacred as the fee simple of the whites; but if by some accident the news should spread among the Indians and the tribes should present their claims, the United States would permanently lose its otherwise acknowledged right to extinguish the Indian title over the greater part of the public lands in the whole state of California. The whole thing is absurd beyond description.

But it is a familiar principle that statutes should never be so construed as to impute absurd and irrational conclusions to the legislature.

Kohlsaat v. Murphy, 96 U. S. 153, 160.

“General terms should be so limited in their application as not to lead to injustice, oppression, or absurd consequences.”

U. S. v. Kirby, 7 Wall. 482, 486.

Church of Holy Trinity v. U. S., 143 U. S. 457, 459, 461.

Lau Ow Ben v. U. S., 144 U. S. 47, 59.

Hawaii v. Mankichi, 190 U. S. 197, 213.

“There are few surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule.”

International Ry. Co. v. U. S. (C. C. A. 2d Ct.) 238 Fed. 317, 321.

Tsoi Sin v. U. S. (C. C. A. 9th Ct.), 116 Fed. 920, 926.

Nor should a construction be given which imputes to Congress a breach of public faith.

U. S. v. Central, etc., Co., 118 U. S. 235, 240.

The application of either or both of these rules of construction convincingly shows that Congress never intended Indian claims to be presented to the Commission.

(f) That the Act did not intend to require tribal Indians to present their occupancy title to the Commission under penalty of its extinguishment, is nowhere better shown than by Section 16, reading:

“That it shall be the duty of the Commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or

labor of any kind, and also those which are occupied or cultivated by Pueblos or Rancheros Indians."

By specifying what was expected and required as to Indian tenures this section excludes everything else.

The Tejon Indians, described as "agricultural, pastoral, sedentary and peaceful," and as "raising crops and pasturing horses, cattle and other stock * * * gathering the natural products of the soil * * * and residing in permanent dwellings," on the Indian tract (Complaint, Par. V) are within the description of Section 16; and the proof will still more clearly show that they were and are not only engaged in agriculture, but were and are "Rancheros Indians" formerly residing in numerous permanent villages or rancherias, one of which they still inhabit.

But if, as appellees' theory requires, all these Indians were obliged to present their land claims or titles to the Commission, with the result that if those claims were sustained they would be patented, and if they were rejected the land they covered would become a part of the public domain, what is the sense of directing the Commission to "ascertain and report" on their land tenure? Their rights, whatever they were, would be **adjudicated and fixed** and the decree of the Commission would be the best possible report. The absurdity would be the same as if the United States District Court, to which an appeal lay from the Commission, had been directed first to **pass on and decide** all the Spanish and Mexican land claims and then to **ascertain what they were** and

make a report on them. Once more appellees' theory comes to a ridiculous conclusion.

The fact is that Section 16 affirmatively shows that Indians were not expected to present their titles to the Commission. Here is the first mention of Indians in the Act and the first provision which is not expressly or inferentially exclusive of them. Here there is a specific statement of the power and duty of the Commission with regard to Indian titles. Up to this point in the Act, and as to all claims derived from the Spanish or Mexican governments, it is to hear and decide; now, as to Indian land tenures, it is to "ascertain and report." This definition and limitation of its duty is necessarily exclusive.

"Expressio unius est exclusio alterius is a universal maxim in the construction of statutes."

U. S. v. Arredondo, 6 Pet. 691, 724.

"It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication prohibited their sale in any other way."

Smith v. Stevens, 10 Wall. 321, 326.

"When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."

Raleigh, etc., Co. v. Reid, 13 Wall. 269, 270.

"This Court from its first organization until this time have held that this enumeration of the cases in which it had appellate jurisdiction was an exclusion of all others."

Ex parte Craue, 5 Pet. 189, 204.

“They (the legislators) have not declared that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction and **this affirmative description has been understood to imply a negative of such appellate power as is not comprehended within it.**”

Durousseau v. U. S., 6 Cranch., 307, 314.

“* * * The general rule that the affirmative description of the cases in which the jurisdiction may be exercised **implies a negative on the exercise of such power in other cases.**”

In re Heath, 144 U. S. 92, 93.

See also:

Beley v. Naphtaly, 169 U. S. 353, 360.

Cherokee Intermarriage Case, 203 U. S. 76,
94.

Union Pacific R. R. Co. v. Snow, 231 U. S.
204, 213.

It necessarily follows not only that the Act does not require the presentation of Indian titles, but that, under a universal maxim of statutory construction, by giving the commission definite powers and duties as to Indians and their titles, it excludes from its jurisdiction all other powers, and among them that of adjudication upon these titles. Indian rights, whatever they were, were to be considered apart from the discrimination between valid grants and ungranted public land to make which was the main duty of the Board.

It must not be forgotten that such was the opinion of the Commission itself in this very case where, after referring to the mention in the grant of the

Indian possessory title, it says: "This, however, is a question cognizable before another tribunal." (Transcript, p. 12.)

There is a reference to this section in *Barker v. Harvey*, 181 U. S. 481, 492, but it contains nothing opposed to the foregoing and indeed makes clear that the above considerations were not presented to the court in that case.

(g) Bearing in mind on the one hand that the purpose of the Act was to segregate private lands from public domain, and on the other that the Indian title is an easement, use or trust and not the fee title [4 (a) *supra*], it is clear that in every case the necessary controversy must be between the fee claimant and the United States. The Supreme Court pursuing this fact to its logical conclusion has specifically held it **improper for the holders of titles subordinate to the fee to present their claims to the Commission.**

In *U. S. v. Fossat*, 61 U. S. 413, "private and adversary" contestants of the grantee's title opposed confirmation in the name of the United States. The court says (p. 424)

"It is the opinion of the Court that the **intervention of adversary claimants in the suit of a petitioner under the Act of March 3d, 1851, for the confirmation of his claim to land in California, is a practice not to be encouraged.** The Board of Commissioners was instituted by Congress to * * * enable the government to distinguish the public land from that which had been severed from the public domain by Mexico."

The Court then describes the scheme of procedure, mentions the fact that the patent does not affect third persons, and concludes

“The language and policy of these enactments limit a controversy like the present to the United States and the claimant.”

Since the Indian title is in the nature of an easement, use or trust with which the fee title is charged, it will be seen that the same thing is in effect held in *Townsend v. Greeley*, 72 U. S. 326, 335, where the Court says:

“Whether the legal title thus secured to the patentee was to be held by him charged with any trust was not a matter upon which either board or court was called to pass. If the claim was held subject to any trust before presentation to the board the trust was not discharged by the confirmation and the subsequent patent. The confirmation only inures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties.”

Such also was the direct decision of the Board itself as to the fee title now in controversy when it said that “this (the question of the Indian use) is cognizable before another tribunal.”

To the same general effect see:

U. S. v. Morillo, 68 U. S. 706, 709.

Meader v. Norton, 78 U. S. 442, 457-8.

Carpentier v. Montgomery, 80 U. S. 480,
495.

Botiller v. Dominguez, 130 U. S. 238, 249.
Monroe Cattle Company v. Becker, 147 U.
S. 47, 57.

We submit that the foregoing examination of the Act conclusively demonstrates both affirmatively and negatively that Indians were not required to present their tribal title to the Board. Appellees' case, therefore, necessarily collapses.

6. The provision of Section 13 that lands, the claims to which were rejected, or not presented within two years, "shall be deemed, held and considered as part of the public domain of the United States," offers no obstacle whatever to our contention that the Act did not require tribal Indians to present their claims to the Board.

There are, so far as we know, only two arguments derived from the Act and relied upon by our opponents as upholding their theory that tribal Indians must present or lose their claims. One is that "public domain" is the same as "public lands"; that lands encumbered with the Indian easement or use cannot be treated or considered as "public lands" in the ordinary sense; and that, therefore, when Section 13 made lands to which claims had not been presented part of the public domain, it intended to extinguish the Indian title wherever unrepresented.

The other is that when Section 15 provides that decrees and patents alike "shall be conclusive between the United States and the said claimants only and shall not affect the interests of **third persons**," the last two words do not mean what they say, but

denote some special and restricted class among whom Indians are not included.

Both arguments, so far as we know, are derived solely from *Barker v. Harvey*, 181 U. S. 481.

Taking up the first, we notice that while it would have been perfectly easy for Congress, if so minded, to have said that unclaimed land should become part of the “public lands of the United States” it did not in fact do so. It said “public domain.”

Now, while it is true that these expressions are sometimes loosely used as equivalent, it is perfectly obvious that they are not in fact synonymous. A national park, or a forest reserve, or an Indian reservation is certainly part of the public domain, and as certainly not a part of the “public lands of the United States” in the sense of lands subject to sale or disposal under general laws. The ground occupied by lighthouses, post offices, coast defenses, national cemeteries, military camps and the like is certainly public domain. But it is not public land of the United States in the technical sense.

Therefore, when *Barker v. Harvey* makes the sweeping statement—

“ ‘Public domain’ is equivalent to ‘public lands’ and * * * the words ‘public lands’ are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws” (p. 490),

its dictum, whether tested by obvious facts or by other decisions of the same court, is hasty and incorrect. Congress chose to use the wider expression

“public domain,” which would include all lands, the underlying fee title to which is in the United States. What possible justification is there for stating that it did not mean what it plainly said? In view of all the other reasons against the inclusion of Indians within the requirements of the Act, it is consistent to conclude that Congress purposely and not negligently or accidentally used the wide words and not the words which had received a narrow and limited construction, in order to show by one more indication that the Indian title was to remain unaffected by the Act.

What is really meant by “public domain” is seen in *Missionary Society v. Dalles*, 107 U. S. 336, where the Court, referring to the Act of 1848, organizing the Territory of Oregon, said:

“The **public domain** included within the Territory of Oregon by the Act just mentioned, had not then been surveyed, nor was it open to settlement, pre-emption or entry. * * * The title was in the United States **subject to the possessory Indian title to portions of the Territory.**” (p. 344.)

This was exactly the situation in California at the time of the Act of 1851. There had been no surveys, and the public land laws were not applied to the State until March 3, 1853 (10 Stat. L. 244). To public lands of that status the Supreme Court applies with precision the term “public domain,” by which Congress in the Act of 1851, with equal precision, described lands unclaimed, or the claims to which had been rejected by the Commission. In both cases “the title was in the United States **subject to**

the possessory Indian title to portions of the territory.”

To the same effect are:

Buttz v. Northern Pacific Ry., 119 U. S. 55, 70.

St. Paul, etc., Ry. Co. v. Phelps, 137 U. S. 528, 541-2.

But while the use of “public domain” instead of “public lands” in the ordinary use of language makes it clearer that the unclaimed land fell into a classification to which the Indian title might, and commonly did, attach, yet we have no need to stress the words unduly. The same result would be reached even if Congress had said “public lands of the United States,” since land may be, and often has been, treated as public land of the United States, although admittedly subject to the Indian title of occupancy and possession.

Note first that “public lands” does not always or necessarily have the limited, technical meaning emphasized in *Barker v. Harvey* as though it were the only meaning. In construing an act granting a right of way through the “public lands,” the Supreme Court, in a much more recent case than *Barker v. Harvey*, says:

“But it is said that the right of way section was inapplicable because it was confined to ‘public lands,’ a term used to designate such lands as are subject to sale or other disposal under general laws. **No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense.** We think that is the case here, first, because the provision in the same

section that the United States should extinguish as rapidly as might be **the Indian title to all lands required for the right of way implies that Indian lands as to which Congress properly could grant a right of way were intended to be included.**”

Kindred v. U. P. R. R. Co., 225 U. S. 582,
596.

Here then, lands in the possession of Indians might be none the less “public lands” and the United States might grant them and extinguish the Indian title later. The Barker v. Harvey statement is in effect overruled.

In like manner, this Court in U. S. v. Blendaaur, 128 Fed. 910, 913, says:

“The contention of appellee that they were not public lands because these words indicate only such lands belonging to the United States, ‘as are subject to sale or other disposition under general laws’ (citing Barker v. Harvey and other cases) cannot be sustained. The words ‘public lands’ are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used and it is the duty of the Court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results.”

Barker v. Harvey (p. 491) presses this point to the extent of saying:

“It could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States.”

And again:

“Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing confirmation of that claim if the only result was to transfer the naked fee to him burdened by an Indian right of permanent occupancy.” (p. 492.)

Now, whatever may have been claimed in *Barker v. Harvey*, we do not claim in the case at bar an inextinguishable right of Indian occupancy. We know of no such right. We do claim, however, a right of occupancy **inextinguishable except by the government**. We do not contend that the requirement in the Mexican grant of non-interference with the Indians **by the grantees** made the Indian right absolute and perpetual **as against the government**. We claim for this title the status of a tribal Indian title resting primarily on the general right of occupancy and fortified by a recognition of it in the grant as an existing right, with a prohibition against interference with it **by the grantees**, thus making clear the fact that in granting the fee Mexico did not intend to extinguish the Indian title. We do not at all argue that the Mexican government prior to 1846, or the United States government afterwards, could not have extinguished it. We do argue, however, that only the government had the power to do so; that the grantees and their successors had no such power and that the Indian title is permanent **until the government sees fit to act**.

The opinion in *Barker v. Harvey* is in some respects elusive and hard to understand. If, however,

it means that the claim there was for a perpetual Indian right beyond the power even of the government to extinguish, that fact alone distinguishes it so radically from the case at bar as to make it worthless as an authority against us. This will be more fully discussed in its proper place.

Returning to our present topic, however, lands subject to the ordinary Indian title above described and here claimed, have over and over again been treated as public lands both of Mexico and the United States and have been granted subject to that title. This is demonstrated by the cases already cited under 4 (b) *supra*. They may not have been so granted under general laws, but as we have just seen “public lands” does not necessarily mean lands grantable under general laws—still less does “public domain.” If *Barker v. Harvey* contradicts this, it is a reed broken by a ponderous weight of authority emanating both earlier and later from the same court.

7. Section 15 reading—

“That the final **decrees** rendered by the said Commission or by the District or Supreme Court of the United States, or **any patent** to be issued under this act **shall be conclusive between the United States and the said claimants only, and shall not affect the interest of third persons,**”

in plain and simple language preserves the Indian title under decree and patent alike until the government itself affirmatively acts to extinguish it.

In the first place we note that the Commission itself so held in this very case. Referring to the protective provision in the grant it says:

“This restriction we have heretofore decided, **does not affect the right of property**, though it may create a use in favor of Indians living on the land at the time the grant was made to the extent actually occupied by them. This, however, is a question cognizable before another tribunal.” (Transcript, page 12.)

The recognition in the grant of the Indian title is thus declared to be consistent with and unaffected by the passing of the fee. The Indian use or easement is left to the protection of a court of equity if ever it were questioned or interfered with. The commission, therefore, deciding that its function was solely to determine whether the fee was in public or private ownership, declared that it had no jurisdiction to pass on the Indian title. Its decision containing this passage was affirmed by the District Court and an appeal was dismissed by the Supreme Court. (Transcript, p. 12.) Yet, if appellees' position is correct, this refusal to take jurisdiction was error and the case should have been reversed. The Supreme Court, however, thought otherwise. We submit that the announced lack of jurisdiction of the Commission in this particular thus became the law of the case; that it constitutes *res judicata*; that the trial court here in taking a contrary position in effect overruled the Supreme Court; and that its judgment should now be reversed on this ground alone.

But we do not need to rest on this. We confidently submit that *Barker v. Harvey* is demonstrably wrong if it says that the Indians here concerned may not take advantage of the provision that decrees and

patents shall not affect third persons. Let us see what it actually does say. It quotes from *Beard v. Federy*, 3 Wall. 478, 492:

“The term ‘third persons’ as there used does not embrace all persons other than the United States and the claimants, but only those who hold superior titles such as will enable them to resist successfully any action of the government in disposing of the property.”

It then continues:

“If these Indians had any claims **founded on the action of the Mexican Government** they abandoned them by not presenting them to the Commission for consideration, and they could not, therefore, in the language just quoted, ‘resist successfully any action of the government in disposing of the property.’ ” (p. 491.)

The words we have underlined suggest a contention that a provision for non-interference with Indians, found in one of the two Mexican grants there involved (although not in the one confirmed) was urged as constituting “action of the Mexican government.” If so, *Barker v. Harvey* is again distinguishable, since our claim here is that the non-interference condition in the grant was simply a recognition of the pre-existing Indian right, showing by way of precaution that the government was informed of the presence of Indians on the granted land and did not intend any interference with their possessory title by granting the fee.

This, however, will be discussed later.

Reverting to our present question, whether or not the Indians, with their possessory title, are such "third persons" as to be outside the scope of the decrees and patents, we call attention, secondly, to the general principle that a patent or any other grant does not cut off the rights of third persons by implication.

"Thus, a grant, even by act of parliament, which conveys a title good against the King, **takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public, although the grant is general of the land.**"

U. S. v. Arredondo, 6 Pet. 691, 738.

U. S. v. Fernandez, 10 Pet. 303, 305.

Much more must this be true where, as here, the patent does contain a saving clause. (Transcript, p. 13.)

"Grants of the strongest sort * * * do not extent beyond the meaning and intent expressed in them, **nor, by any strained construction, make anything pass against the apt and proper, the common and usual signification and intendment of the words of the grant.**" (Arredondo Case, p. 739.)

Only by a strained construction could the Indians be excluded from the term "third persons."

Next, the United States patent issued on confirmation of a grant was a quit claim or at best a confirmation, and added no new qualities to the patentee's title.

"When, therefore, guided by the action of the tribunal established to pass on the validity of these

alleged grants, the government issued a patent, it was in the nature of a quit-claim, an admission that the rightful ownership had never been in the United States but had passed at the time of the cession to the claimant. * * * Such a patent was, therefore, conclusive evidence **only as between the United States and the grantee** that the latter had established the validity of the grant.”

Adam v. Norris, 103 U. S. 591, 593.

Referring to this passage, the same court later says:

“It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than a quit claim.”

And again:

“These alleged rights and limitations arise under the Act of March 3, 1851, which this court has repeatedly held **did not originate Federal rights or titles, but merely confirmed the old.**”

Los Angeles Milling Co. v. Los Angeles, 217 U. S. 217, 227, 233.

This last opinion refers to and is based on Boquillas, etc., Co. v. Curtis, 213 U. S. 339, 344, where the Court says:

“The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title, **but releases that of the United States**; Beard v. Federy, 3 Wall. 478, 491; and that by the grant from the United States, it gained rights as a riparian proprietor that cannot be displaced by a subsequent attempt

to appropriate the water. * * * But while it is true that in *Beard v. Federy*, *supra*, Mr. Justice Field calls such a patent a quit claim, we think it rather should be described as a confirmation **in a strict sense**. ‘Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer’s power, makes it good and valid; so that the confirmation doth not regularly create an estate.’ * * * **It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant,**” with much more to the same effect, noting also that something might be urged to the contrary, but concluding:

“But we are satisfied that the true intent of the statute and the reason of the thing are as we have said.”

This deliberate pronouncement not only corrects *Beard v. Federy* and shows that the confirmer took no more by the patent than the Mexican grant gave him, viz.: in this case the fee, subject to the Indian use which that grant expressly reserved, but it is highly confirmatory of our immediate contention that the Indians are “third persons” under Section 15.

To the same effect is:

Wilson Cypress Co. v. Del Pozo, 236 U. S. 635, 649.

Finally, the definition of “third persons” in *Beard v. Federy*, cannot be and was not intended to

be exclusive, and the Indian title being such as heretofore described, is exactly the sort of interest which Section 15 was intended to preserve.

In *Beard v. Federy*, 70 U. S. 478, a claim of the Bishop of Monterey as a corporation sole to 19 acres of church land, was confirmed by the commission and a patent issued. Later his grantee brought ejectment against one who occupied under a subsequent and unrecorded Mexican grant, made a few days before the end of Mexican sovereignty, unapproved by the Departmental Assembly and which had never been presented to the commission for confirmation, and was therefore void for the two reasons last mentioned. The defendant contended that he was a "third person" under Section 15; that as against him the patent was not evidence for any purpose and that the whole question as between the Bishop's title and the governor's grant remained open as though no proceedings before the commission had ever been had. The Court with unquestionable accuracy held that the United States patent showed that the Bishop's claim was valid under the law of Mexico; might have been located under the former government and was correctly located now; and that it was conclusive not only against the government, but "against parties claiming **under the government by title subsequent**"—in other words, such parties as the defendant. **With reference, therefore, to the facts before it**, the Court stated that "third persons" meant "those who hold superior titles such as will enable them to resist successfully any action of the government in disposing of the property"; in other words, the only persons who could come into court and at-

tack the patent or maintain that “the whole subject of titles is open precisely as though no proceedings for the confirmation had ever been had and no patent for the land had been issued” (p. 491) are those who could show another patent issued upon a confirmed grant, or some title of equal dignity which could have been set up against the Mexican or American government itself, when the one made the grant or the other issued its patent.

In the instant case, of course, we make no attack whatever upon the patent. We merely contend that when it was made a small portion of the land it covered was and still is subject to a recognized Indian title. We are merely asserting that the fee to that part passed subject to an Indian easement or use as it has repeatedly passed in other cases. *Beard v. Federy*, therefore, presents no similarity to the facts here involved.

It is too clear for argument that when Congress said that decrees and patents “should not affect the interests of third persons” they did not mean **only** such third persons as are described in *Beard v. Federy*. Suppose the Mexican grantee had given a lease which was outstanding when he presented his grant and received his patent. Would anyone doubt that the lease remained valid unaffected by the confirmation or patent? Suppose that in the devolution of the granted title under Mexico the fee had become subject to a life estate in XY. Would anyone suppose that a confirmation and patent to AB would extinguish the life estate? Suppose that the fee was

subject to an easement of right of way. Could anyone conceive that the confirmer would take title discharged of that easement?

In other words, the term "third persons" necessarily has a general signification outside of the restricted application required by the narrow and unusual facts of *Beard v. Federy*. It necessarily includes exactly the sort of persons of whom the tribal Indians are examples. This view is confirmed by repeated decisions of the Supreme Court:

"Whether the legal title thus secured to the patentee was to be held by him **charged with any trust was not a matter upon which either board or court was called to pass.** If the claim was held subject to any trust before presentation to the board, **that trust was not discharged by the confirmation and subsequent patent.** The confirmation only inures to the benefit of the confirmer so far as the legal title is concerned. It establishes the legal title in him, but it **does not determine the equitable relations between him and third parties.** * * * If the trust was not stated and did not appear, the legal title was none the less subject to the same trust in the hands of the claimant."

Townsend v. Greeley, 72 U. S. 326, 335.

In another case the commission had confirmed a forged grant and patent had issued upon the confirmation. The genuine grantees also had separately presented their claim to the commission, which rejected it, misled by the forged evidence which caused the confirmation to the pretended grantee. Later the genuine grantee brought suit to have the fee title in

the hands of the fraudulent grantee impressed with a trust; which was done. The court says:

“It is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants.”

After agreeing with the general principle that the decision of a tribunal with jurisdiction is usually conclusive and that even fraud does not always open such decision, the Court continues:

“But it is not important to enter much into that field of inquiry, as the fifteenth section of the Act under which the commissioners were appointed, provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States, or any patent to be issued under the Act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons. **Nothing more is contemplated by the proceedings under that Act than the separation of the lands which were owned by individuals from the public domain**”—

with much more to the same effect:

Meader v. Norton, 78 U. S. 442, 457.

Again we note:

“It is true that the 15th section of the Act declares that the decree of confirmation shall be conclusive between the United States and the claimants only and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceedings who

might have Spanish or Mexican claims independent of or superior to that presented by claimant, **or the equitable rights of other parties having rightful claims under the title confirmed. * * *** The latter class, those equitably entitled to rights in the land under the title confirmed, were not to be cut off. Their equities were reserved. But they must seek them in a proceeding appropriate to their nature and condition.”

Drawing a parallel between the situation before it and a patent granted to a pre-emption claimant, the Court continues:

“Whilst the patent in that case confers the legal title and admits of no averments to the contrary, the patentee **may be subject in equity to any just claim of a third party even to the extent of holding the title to his sole use.**”

Carpentier v. Montgomery, 80 U. S. 480,
495-7.

The Court in this opinion refers to Beard v. Federy, *supra*, and evidently had in mind to correct any misapprehension that might arise from the narrow application given to “third persons” in that case.

In this connection we invite the attention of the Court to the relevancy of the cases cited under 4 (b) and 4 (c) *supra*. It was there established by Supreme Court decisions, first, that the Indian title is not extinguished by a mere grant in fee by the government; second, that it is extinguished only by words or acts affirmatively showing such intent; and

third, that throughout the history of this government, and its predecessors, it has never been extinguished without compensation. Each one of these principles confirms the provision that Indians are among the “third persons” whose right was to remain undisturbed by decrees or patents.

We respectfully request the Court to glance again at these cases. Their cumulative effect is overwhelming.

We submit that the foregoing considerations and decisions dispose of the contention that Indians are not “third persons” under Section 15, and affirmatively show that they come directly within the protection of the Act in that regard.

8. Familiar principles of statutory construction not only support but require the interpretation of the Act for which we contend.

We do not concede that there is any necessity to invoke technical rules of construction here. Nothing more is needed than to read the Act as a whole, giving its language the ordinary meaning throughout and specially noting the features above referred to merely because they are those particularly relevant to our situation. But if any passages seem to the Court ambiguous, there are four recognized rules, any one of which must turn the scale in favor of Indian rights.

(a) In view of the ignorant, dependent and helpless state of the Indians and the assumption of the government toward them of the high obligation of guardian to ward, statutes and treaties are invari-

ably construed liberally in their favor. This principle has prevailed throughout the entire history of this country and is stated and applied in innumerable decisions of the Federal Courts. The following excerpts are specimens of a great number.

“As often affirmed in the decisions of this Court, the Indians are in a certain sense the wards of the United States and **the legislation of Congress is to be interpreted as intended for their benefit.**”

Marks v. U. S., 161 U. S. 297, 303.

“The settled rule that as between whites and Indians the laws are to be construed most favorably to the latter.”

Cherokee Intermarriage Case, 203 U. S. 76,
94.

“But in the government’s dealings with the Indians, the rule is exactly to the contrary (of strict construction). The construction instead of strict is liberal. Doubtful expressions instead of being resolved in favor of the United States are to be resolved in favor of the weak and defenseless people who are wards of the nation and dependent wholly upon its protection and good faith. This rule of construction has been recognized **without exception** for more than 100 years.”

Choate v. Trapp, 224 U. S. 665, 675.

To the same effect see:

Fellows v. Blacksmith, 60 U. S. 366.

U. S. v. Kagama, 118 U. S. 375.

Choctaw Nation v. U. S., 119 U. S. 1, 28.

Cherokee Nation v. Ry. Co., 135 U. S. 641,
652.

Frost v. Weenie, 157 U. S. 46.
Jones v. Meehan, 175 U. S. 1.
U. S. v. Rickert, 188 U. S. 432.
U. S. v. Wynans, 198 U. S. 371.
Winters v. U. S., 207 U. S. 564.
U. S. v. Celestine, 215 U. S. 278.
Tiger v. Investment Co., 221 U. S. 286.
Northern Pacif Ry. v. U. S., 227 U. S. 355,
366.
U. S. v. Pelican, 232 U. S. 442.
U. S. v. Nice, 241 U. S. 591.
Alaska, etc., Co. v. U. S., 248 U. S. 78.
Seufert Bros. v. U. S., 249 U. S. 194.

Barker v. Harvey, 181 U. S. 481, 492, admits the existence of this principle, saying, "this court has uniformly construed all legislation in the light of this recognized obligation," but continues:

"But the obligation is one which rests upon the political department of the government, and this court has never assumed in the absence of congressional action to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. Our attention has been called to no legislation by Congress having special reference to these particular Indians."

This is one of the passages in the decision upon which, to use the language of Lord Eldon, "the mind of man doth not readily fasten." The obligation to resolve doubts in favor of Indians was, under a long line of decisions of the same court, as well settled as the obligation of Congress to legislate with an eye to

their helplessness and dependency. What reason or excuse was there for evading it in that single instance? "Congressional action" in the shape of the Act of 1851 was before the court. Why not construe it as "this Court has uniformly construed all legislation, in the light of this recognized obligation?" What bearing had the absence of "legislation by Congress having special reference to these particular Indians," upon the duty of the Court to follow its own established rule in construing the piece of legislation then under discussion?

We hope the court may be more successful than we have been in finding answers to these questions; but in any event, it is clear that *Barker v. Harvey* admits the principle of liberal construction in favor of Indians, which the same court in a much later case has stated to be "without exception"; and shows no satisfactory reason for departing from it in the case then before the court.

(b) The second rule of construction, equally arising from the peculiar position of Indians in this country, is that general acts of Congress do not apply to them at all unless so worded as clearly to manifest an intention to include them.

"General Acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them. Constitution Art. I, Sec. 2, 8; Art. 2, Sec. 2; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515; *U. S. v. Rogers*, 4 How. 567; *U. S. v. Holliday*, 3 Wall. 407; *Case of the Kansas Indians*, 5 Wall. 737; *Case of New York Indians*, 5 Wall. 761; *Case of the Chero-*

kee Tobacco, 11 Wall. 616; U. S. v. Whiskey, 93 U. S. 188; Pennock v. Commissioners, 103 U. S. 44; Crow Dog's Case, 109 U. S. 556; Goodell v. Jackson, 20 Johns, 693; Hastings v. Farmer, 4 N. Y. 293."

Elk v. Wilkins, 112 U. S. 94, 100.

Similarly where Congress had made to a railroad company a general grant of alternate sections of land some of which fell within a tract in Indian possession, the court, in deciding that the Act did not apply to the latter, said:

"We are not without authority that the general words of this grant did not include an Indian reservation (citing and discussing cases). * * * "Congress cannot be supposed to grant them (Indian reservations) by a subsequent law general in its terms. **Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.**"

Leavenworth, etc., R. R. v. U. S., 92 U. S. 733, 745.

See also U. S. v. Nice, 241 U. S. 591, 600.

This rule is an obvious outcome of the peculiar relations of Indians to the government and the unusual nature of their land tenure. Since their status is exceptional, it is not considered to be covered by general language of statutes in the absence of an unmistakable showing of intent.

As already said, we see no need to resort to rules of construction, but if there is such need, here is the rule. Its application once again relieves Indians from the unjust and unprecedented obligations and disadvantages thrust upon them under appellees' theory.

(c) In Par. 2 of our main argument we have shown the ample guaranty given by the United States in the treaty of 1848 that it would respect all property rights in the ceded territory, including those of Indians.

Appellees' theory is that by the Act of 1851 the government under form of law, in effect falsified its pledge by making the preservation of the Indian title conditional upon wild savages, or at best semi-civilized children, becoming aware of the proceedings of Congress at Washington; and thereupon within a limited time convening from distances of hundreds of miles, through wild and unsettled country, extensively occupied by suspicious or warring tribes, at San Francisco, and there appearing unaided before a white man's court, and making formal proof in a foreign language according to a prescribed procedure. This is, indeed, 'to keep the word of promise to the ear and break it to the hope.' It makes Congress cloak the purposeful confiscation of a title it had undertaken to preserve, by means of a dishonorable subterfuge.

But a third principle forbids such conclusion. Statutes must not be so construed as to accuse the United States of bad faith.

“As the transfer of any part of an Indian reservation secured by treaty would also involve a **gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.**”

Leavenworth, etc., R. R. v. U. S., 92 U. S.
733, 742.

“General terms should be so limited in their application as not to lead to **injustice, oppression** or an absurd consequence.”

U. S. v. Kirby, 7 Wall. 482, 486.

Quoting with approval an English case, the Supreme Court says:

“If there are no means of avoiding such an interpretation of the statute (as will amount to a great hardship) a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but to my mind a judge **ought to struggle with all the intellect that he has and with all the vigor of mind that he has against such an interpretation of an Act of Parliament**; and unless he is forced to come to a contrary conclusion he **ought to assume that it is impossible that the legislature could have so intended.**”

Hawaii v. Mankichi, 190 U. S. 197, 214.

To the same effect see:

Frost v. Wenie, 157 U. S. 46, 59.

Richardson v. Ainsa, 218 U. S. 289, 298.

Missouri, etc., Ry. v. U. S., 235 U. S. 37, 41.

Comment and further citations are unnecessary.

(d) The fourth rule has been fully discussed already under 4 (c) of our main argument, where it was proven by Supreme Court decisions that throughout American history the Indian title has never been abrogated inferentially or without compensation. Our construction of the Act of 1851 is consistent with these established principles; appellees' construction is incompatible with them.

9. Contemporaneous legislation both of the United States and the State of California and subsequent legislation of the United States are in line with our construction of the Act of 1851, and show that both nation and state regarded the Indian possession as an admitted right which not only was not to be inferentially extinguished, but was to be affirmatively protected.

As an aid to ascertain whether or not Congress by the Act of 1851 had the purpose, elsewhere unknown in American history, to compel tribal Indians to come into court and prove their title or lose it, it is instructive to note contemporaneous and subsequent legislation relating to California Indians.

(a) The Indian Appropriation Act of September 30, 1850 (9 Stat. L. 558), reads:

“To enable the President to hold treaties with the various Indian tribes in the State of California, \$25,000.”

The Deficiency Appropriation Act of February 27, 1851 (9 Stat. L. 572), provides:

“For expenses of holding treaties with various tribes of Indians in California, in addition to the appropriation of the 30th of September, 1850, \$25,000.”

Here we see that four days before the Act of March 3, 1851, was passed, the same Congress was providing for the regular procedure followed for nearly a hundred years in the history of this country. Recognizing in the California Indians the same possessory right as that of Indians elsewhere it contemplated treaties whereby the Indians would relin-

quish title to a portion of their territory in consideration either of money payments, or the protection and confirmation of their title to other lands, or both.

It is impossible to suppose that the simultaneous intent of Congress was to impose upon these Indians a requirement which would inevitably extinguish almost every Indian title in California without reservation or compensation of any kind.

(b) The Act of March 3, 1853 (10 Stat. L. 244, 246-7), "introducing the land system into California" (*Newhall v. Sanger*, 92 U. S. 761, 765) is another clear indication of Congressional intent to respect the Indian title. By this time the two years allowed for presenting claims under the Act of 1851 had expired, private holdings had been segregated or were in process of segregation from the public domain, and if appellees' theory were correct, the occupancy right of practically every Indian in California had lapsed through inaction. Yet, Congress in providing for the survey of public lands and for the grant of pre-emption rights therein not only excepted from pre-emption "lands claimed under any foreign grant or title," but expressly said "that this Act shall not be construed to authorize any settlement to be made on any tract of land **in the occupation or possession of any Indian tribe or to grant any pre-emption right to the same.**"

Indians living on private grants retained, of course, their original rights under Mexican law, and by this Act those living on the public domain were to be protected in their similar title of occupancy. The Court will note that this Act abso-

lutely contradicts not only the idea that Indians must claim their rights or lose them, but also the dictum of *Barker v. Harvey*, that lands encumbered with the Indian title cannot be dealt with as public domain.

(c) On April 22, 1850, the legislature of California passed a law entitled, "An Act for the Government and Protection of the Indians." Section 2 reads as follows:

"Persons and proprietors of lands on which Indians are residing, **shall permit such Indians peaceably to reside on such lands unmolested in the pursuit of their usual avocations for the maintenance of themselves and families**; provided the white person or proprietor in possession of such lands may apply to a Justice of the Peace in the township where the Indians reside to set off to such Indians a certain amount of land, and on such application, the Justice shall set off a sufficient amount of land for the necessary wants of such Indians, **including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such Indians nor shall they be forced to abandon their home or villages where they have resided for a number of years**; and either party feeling themselves aggrieved can appeal to the County Court from the decision of the Justice; and then divided, a record shall be made of the lands so set off in the court so dividing them, and the Indians shall be permitted to remain thereon until otherwise provided for."

The remainder of the Act contains a number of provisions relating to offenses by or against Indians. Some of these were amended by the Statutes of 1855,

page 179; 1860, p. 196, and 1863, pp. 743-745; but none of these amendments affected Section 2, nor has it or the Act ever been expressly repealed. We believe it to be still in force, as Congress in 1891 held it to be, and if so, appellees by the conduct described in the complaint have violated it long and repeatedly and our cause of action against them might be supported on this ground alone. However, our present purpose is to indicate by comparison with other congressional legislation the meaning of the Act of 1851 as to Indian titles, and therefore, without further comment along the above line, we turn to the Act of Congress of January 12, 1891, 26 Stat. L. 712, entitled: "An Act for the Relief of the Mission Indians in the State of California," which refers to the above Act. (The Court will recall that the Tejon Indians are Mission Indians.)

Section 2 of this Act provides for the selection of reservations for each band or village of Mission Indians.

"which reservations shall include, as far as practicable, the lands and villages which have been in the actual occupation of the Indians." Also: "In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed."

The passage first quoted, permanently preserves, as far as possible, the identical and immemorial In-

dian occupancy; the second makes preliminary arrangements looking to the extinguishment of the occupancy title of Indians living on grants, but requires the ascertainment and delimitation of their actual possession. The clear inference is that up to 1891 Indian occupancy titles on grants were still recognized to exist.

The whole Act, which is too long for extended discussion here, is of a tentative nature, indicating the knowledge of Congress that the contemplated removal of the Indians from grants to vacant public land might not always be practicable and that the creation of reservations involved difficulties.

And therefore in Section 6, Congress provides:

“That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican government, and in an Act for the government and protection of Indians passed by the legislature of the State of California April 22, 1850, or to bring any suit, in the name of the United States, in the Circuit Court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.”

Three sorts of Indian rights are here contem-

plated; those secured by the Mexican grant; those set forth in the California Act of 1850; and those rights either legal or equitable arising under the general law of the United States or Mexico and enforceable by suit. Our case falls under all three.

Congress when it passed Section 6, knew of its own Act of 1851; it knew that no tribal Indian claim whatever and hardly any sort of Indian claim had been presented under it; yet it recognizes all these classes of rights as still existing and valid, and affirmatively demands their protection and enforcement. The conclusion that it had never intended to extinguish them is inevitable.

It is hardly necessary to quote authorities as to the relevancy of the several acts above cited.

“The correct rule of interpretation is that if divers statutes relate to the same thing they ought all to be taken into consideration in construing any one of them and it is an established rule of law that all acts **in pari materia** are to be taken together as though they were one law. * * * If it can be gathered from a subsequent statute **in pari materia** what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning and as governing the construction of the first statute.”

U. S. v. Freeman, 3 How. 556, 564.

“These several Acts of Congress dealing as they do with the same subject matter should be considered not only as expressing the intention of Congress at the dates the several Acts were passed, but the

later acts should also be regarded as legislative interpretations of the prior ones.”

Cope v. Cope, 137 U. S. 682, 688.

Tiger v. Investment Co., 221 U. S. 286, 309.

Stockdale v. Ins. Co., 87 U. S. 323, 331.

Bowling v. U. S., 233 U. S. 528, 535.

10. The Act of March 3, 1891 (26 Stat. L. 854), establishing the Court of Private Land Claims to settle Spanish and Mexican titles in New Mexico, Arizona, Utah, Nevada, Colorado and Wyoming, also sheds light on the meaning and purpose of the Act of 1851.

There are differences in its scope and details. But remembering that it was passed by the same Congress and at the same session as the Act of January 12, 1891, just discussed, and that it dealt with the same sort of situation as the Act of 1851, its expression of policy is significant. It is far too long for complete analysis and we will merely touch on a few of its most relevant provisions.

Section 6 defines the claims to be adjudicated as those arising, “by virtue of any such Spanish or Mexican grant, concession, warrant or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession,” and requires the petition to set forth not only the nature of the claim and the “date and form of the grant, concession, warrant or survey,” but also “the names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner.”

This shows that formal or record titles only were

in contemplation, and also that possessory rights were not to be ignored but were to be shown to the court **not by the possessor, but by the grant claimant.**

Sections 6 and 8 make clear that so far as this Act is concerned, Congress rejected the doctrine of *Botiller v. Dominguez*, 130 U. S. 238, that holders of all Mexican titles must present them for adjudication even though they were complete and perfect, and Section 8 states that confirmation shall be

“always subject to and not to affect any conflicting private interests, rights or claims held or claimed adversely to any such claim or title or adversely to the holder of any such claim or title.”

The saving of rights of third persons other than the grantees and the United States is very sweeping. Equally so is another passage in Section 8:

“And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons in respect of any such lands shall be in any manner affected thereby.”

Section 13 confines confirmation to claims “upon a title **lawfully and legally derived**” from Spain, Mexico, or a Mexican state, and provides:

“Second: No claim shall be allowed that shall **interfere with or overthrow any just and unextinguished Indian title or right to any land or place.**”

Its fifth and sixth subdivisions again exclude:

“The private right of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this Act had not been passed,” and denies that confirmation shall operate otherwise

“than as a release by the United States of its right or title to the land confirmed.”

Now the vast mass of the land affected by this Act was acquired under the treaty of Guadalupe Hidalgo, just as California had been. Spanish and Mexican grants of the same sort as those coming under the Act of 1851, but lying in other states and territories, were now to be passed on. Indians were living on many of these grants under their original possessory title just as they were in California. They had no different or higher right than had the California Indians nor were they entitled to more favored treatment. Yet, it is clear beyond peradventure that they were not expected to present their titles to the Court of Private Land Claims; that confirmation of a grant had no effect upon the Indian title or any other title attached to or encumbering the fee; and that no claim was to be allowed that so much as interfered with, much less that overthrew, any existing Indian right.

We must either conclude that the Act of 1851 was a startling and anomalous departure from the uniform trend of statutory consideration for Indians and an inexplicable and underhand attack on rights recognized before and since without exception by every department of the government—that Congress at that time was as active to disinherit the harmless

and peaceful Tejons and other Mission Indians as it was later to protect the ferocious Apache or the troublesome Navajo or Ute—or else we must decide that the Act of March 3, 1891, was a legislative construction so far as Indians were concerned of the Act of 1851, and a restatement of the same principles that the earlier Act had more concisely embodied.

The Acts of 1850 and 1853, contemporaneous with the Act of 1851, and the Act of January 12, 1891, contemporaneous with the Act under discussion, are decisive in favor of the latter view.

11. Barker v. Harvey is not parallel or controlling here.

We respectfully submit that appellant's position has been conclusively established. Appellees' sole reliance to the contrary so far as yet disclosed is *Barker v. Harvey*, 181 U. S. 481. That case has already been sufficiently examined to show that some of its theories of law, set forth by way of preamble to a decision on the facts, are demonstrably wrong. We do not say this presumptuously, because the test is not any reasoning or opinion of our own, but an imposing array of earlier and later decisions by the same eminent tribunal. Recognizing, however, that if that case were on all fours with the case at bar, this court might, however reluctantly, think itself bound thereby, we will briefly distinguish it in four particulars.

(a) In *Barker v. Harvey* the Indians concerned had voluntarily abandoned their occupancy, and by that fact alone had lost their possessory title,

quite irrespective of anything else that they did or failed to do. In the case at bar the land in controversy **has been immemorially occupied and is still occupied by the Indians** except as to parts thereof from which they have been wrongfully and forcibly expelled by appellees or their predecessors. (Complaint, Pars. V, IX, X.)

Two Mexican grants were relied upon by claimant in the Barker case (pp. 482, 493-498), one originally made to Pico in 1840, but not approved by the departmental assembly (p. 494), the other made in 1845 directly to Warner, claimant's grantor, and approved by the assembly (pp. 496, 497). The latter embraced the premises described in the former.

The commission held that claimant's right depended **entirely** on the second grant (p. 497), which it confirmed (p. 498). The expediente of this grant stated that the land claimed

"is and has for the last two years been vacant and abandoned * * * but said place belongs at the present time to the said Mission" (p. 494).

Also, on authority of one of the Mission Fathers, that:

"The Valley of San Jose can be granted to the party who petitions for it, inasmuch as the Mission of San Diego, to whom it belonged, has no means sufficient to cultivate and occupy it, and it is not so necessary for the Mission" (p. 495).

The Supreme Court found as facts:

"The report of the justice of the peace was that the land had been for two years vacant and aban-

done; that there were some property rights vested, **not in the Indians**, but in the Mission of San Diego, and the official of that Mission consented to the grant." (p. 498.)

And again:

"It thus appears that prior to the cession, the Mexican authorities upon examination **found that the Indians had abandoned the land**" (p. 499); with more to the same effect.

Here then, there was established by official Mexican investigation and judicially determined by the Supreme Court a fact **absolutely fundamental, and in itself conclusive of the whole case**. An abandonment being shown by the best evidence, the fee was **ipso facto** relieved of the Indian title, and **nothing more was necessary to the decision of the case**.

"They (grants) were valid to pass the right of the crown subject to their (Indian) right of occupancy; **when that ceased * * * by the abandonment of the Indians the title of the grantee became complete.**"

U. S. v. Fernandez, 10 Pet. 303, 305.

"The fact of the abandonment was the important one to be ascertained; **if voluntary, the dominion of the crown over it was unimpaired in its plenitude**; if by force, the Indians had the right, whenever they had the power or inclination, to return."

U. S. v. Arredondo, 6 Pet. 689, 747.

"The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it

is only a right of occupancy. The possession, **when abandoned by the Indians**, attaches to the fee without further grant."

U. S. v. Cook, 19 Wall. 591.

The legal speculations in the first part of the Barker case are therefore dicta.

(b) In the Barker case the unapproved Pico grant of 1840 contained a prohibition against molesting the Indians (p. 493). The approved Warner grant of 1845, however, said nothing about them (pp. 495-6), in all probability because they had already relinquished their rights by abandoning the premises. The latter was the grant that was confirmed. The Supreme Court says:

"No such condition (of non-interference) was attached to the subsequent grant to Warner." (p. 498.)

And again:

"The Mexican authorities * * * made an absolute grant subject only to the condition of satisfying whatever claims the Mission might have. How can it be said, therefore, that when the cession was made by Mexico to the United States, there was a present recognition by the Mexican government of the occupancy of these Indians? On the contrary, so far as any official action is disclosed, it was distinctly to the contrary, and carried with it an affirmation that they had abandoned their occupancy, and that whatever of title there was outside of the Mexican nation, was in the Mission, and an absolute grant was made subject only to the rights of such

Mission. For these reasons we are of opinion that there is no error in the rulings of the Supreme Court of California.” (p. 499.)

In the case at bar the grant was made on the express condition that the grantees “must not interfere with the cultivation and other advantages that the Indians who are found established in said place have always enjoyed.” The grant containing this stamp of affirmation and approval of the Indian occupancy by Mexico was confirmed by the commission.

When, therefore, the Barker case reached the courts, the Indian title was non-existent by reason of abandonment, and **the Mexican government, recognizing this fact, made an absolute grant;** while in our case the Indian occupancy existed before the grant, **was recognized and confirmed by Mexico in the grant,** and has continued down to the present time. How could two cases be more dissimilar?

(c) There being, therefore, in the Barker case, a perfectly simple set of facts on which the decision is finally based, what is the effect of the legal theories discussed in the first half of the opinion? Obviously they are entirely unnecessary to the result, and therefore should be considered as dicta.

In the recent case of *Union Tank Line v. Wright*, 249 U. S. 275, 283-4, Georgia assessed the property of a tank line in that state on the basis of “ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia, and the railroad mileage traversed by its equipment everywhere.” (p. 279.)

The Supreme Court in *Pullman Company v. Pa.*, 141 U. S. 18, had said:

“The mode which the state of Pennsylvania adopted to ascertain the proportion of the company’s property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. **This was a just and equitable method of assessment;** and if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock and no more.”

On appeal by the Tank Company from the assessment, Georgia relied upon the above holding as conclusive; but the Supreme Court did not find it so. It says (p. 283):

“*Pullman’s Palace Car Co. v. Pa.*, *supra*, relied upon by defendant in error, contains the following passage which **seems to uphold the Georgia rule** (quoting the above passage). * * * But the point therein spoken of was **unnecessary to the determination of the cause;** and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results, **it must be regarded as obiter dictum and we cannot now approve or follow it.**” (p. 284.)

Proceeding to discuss the *Pullman* case, the Court concludes:

“In such circumstances the reasonableness of the rule was not really in question and what was said of it cannot control here **where the very point is presented for decision.**” (p. 286.)

So in the Barker case the Indian title had been in fact abandoned and lost. There was, therefore, no conceivable question as to Indian duty to present before the commission a possessory right they had long since given up; and the other questions, whether they were “third persons,” or whether, if their title had persisted, lands encumbered with it could still be public domain, were purely academic.

In *Joplin Mercantile Company v. U. S.*, 236 U. S. 531, 538, it appears that the Circuit Court of Appeals of the 8th Circuit had held that a certain statute was not repealed as to intrastate commerce, notwithstanding two previous decisions of the Supreme Court apparently intimating the contrary. The Supreme Court upheld it in this view, saying:

“As was well said by Mr. Chief Justice Marshall in one of his great opinions, *Cohens v. Virginia*, 6 Wheat. 264, 399: ‘It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. **If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.**’ ”

It has been shown that the first half of the Barker decision goes entirely “beyond the case” then before the court. Now, however, appellant comes with a set

of facts vitally different, and for the first time requiring a decision on the points of law heretofore academically discussed. That discussion “ought not to control the judgment” here. Discussion of points of law not necessary to a decision has no higher authority than the cogency of its reasoning. It is not controlling, and is persuasive only so far as it is sound.

To the same effect as the above cases see:

McCormick Machine Co. v. Altman, 169 U. S. 606, 611.

American Surety Co. v. U. S. (C. C. A. 5th Ct.), 239 Fed. 680, 684.

Northwestern, etc., Co. v. Caldwell (C. C. A. 8th Ct.), 234 Fed. 491, 498.

Schaap v. U. S. (C. C. A. 8th Ct.), 210 Fed. 853.

(d) But we have not exhausted the points of distinction between the Barker case and ours. The facts specially relied on in the **obiter dictum** are also distinguishable.

Our third point is that in the Barker case the Indian claim is treated by the Court as though **solely founded on the provision for their protection in the first and unconfirmed grant.**

“If these Indians had any claims **founded on the action of the Mexican government**, they abandoned them by not presenting them to the commission for consideration.” (p. 491.)

Since Section 8 of the Act of 1851 required the presentation only of claims arising “by virtue of any

right or title **derived** from the Spanish or Mexican government” it was only “**claims founded on the action of the Mexican government**” which could by any stretch of construction be brought within the section. The court evidently considered that such a claim was before it. Our claim, however, is different. It is no more **founded** on the action of the Mexican government, than, if land comes into the ownership of X already charged with an easement, and X conveys the fee specially mentioning and excepting the easement in his deed, the right to the easement would be founded on the exception in X’s conveyance. Our claim is based primarily on the general and immemorial Indian title, of which the provision in the grant was not the foundation, but merely a recognition and protection.

(e) Our fourth point of distinction is that in the Barker case the Indians are treated as claiming that **their occupancy was so fixed and permanent that no one could extinguish it, not even the government.** They are said to have claimed “a right of permanent occupancy” and it is stated that “the government of Mexico had always recognized the permanence of their occupancy.” (p. 482.)

What the court understood by “permanent occupancy” is shown on pages 491-2, where it says:

“If it be said that the Indians do not claim the fee, but only the right of occupation * * * it may be replied that a claim of a right to **permanent occupancy** of land is one of far-reaching effect, and it could not well be said that lands which were burdened with a right of **permanent occupancy** were a

part of the public domain, and **subject to the full disposal of the United States.** There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of a prior government to a **right of permanent occupancy**, for in the latter case the right, which is one of private property, antecedes and **is superior to the title of this government, and limits necessarily its power of disposal**”—with more to the same effect.

Clearly the Supreme Court had, or supposed it had, before it an assertion of an occupancy fixed, immutable and permanent beyond the power of the United States to extinguish it. Otherwise it would not have ignored the score or more of its own decisions holding that the Indian right is one of possession, **perpetual except as against the government, but always subject to the government's right to acquire it.** Some of these cases are quoted in paragraph 3 of our main argument.

No such claim of inextinguishable occupancy is made in the case at bar. Our claim is that the Indian right was original, and indefeasible except as against the government; that Spain or Mexico had the right to extinguish or acquire it, but did not; that the latter on the contrary, in accordance with the uniform tenor of its laws, made clear that the intention of the grant was not to extinguish it, and warned the grantees against interference; that, however, it still retained the right to acquire it later if so disposed, just as the United States has often granted

land subject to the Indian title which it has later acquired; that the confirmation by the commission and the issuance of the patent left the situation unchanged; and that the United States has still the right to extinguish this or any similar Indian title, but that appellees have no right to do so. This is as different from the position rejected in *Barker v. Harvey* as white from black.

From all this it is clear that the *Barker* case is radically and vitally distinct from the case at bar; that not only were different facts then before the Court, but that different theories of law were urged and passed on; and that this court is at liberty to decide the instant issues untrammelled by that decision.

(f) It is worth mentioning that all cases given in Shepard's United States Citations as citing *Barker v. Harvey* have been examined and nothing whatever found inconsistent with any of our contentions, or affirming any of the views we have criticized. Indeed in *Minnesota v. Hitchcock*, 185 U. S. 373, decided a year after the *Barker* case, the opinion, written by the same judge, upholds as against a state claim for school lands the Indian occupancy title to lands unceded by them, relying on many of the cases cited by us, and saying on page 389:

“Confessedly the fee of the land was in the United States subject to a right of occupancy by the Indians. **That fee the government might convey,** and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee would acquire a perfect and unburdened title and right of possession. At the

same time the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

Later the court emphasizes by many citations the rule that under government policy and statutory construction alike—

"It is a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress."

Either this case overrules *Barker v. Harvey*, in regard both to principles of construction and to the idea that land occupied by Indians cannot be public domain, subject to conveyance by the government, or else it shows that the court supposed it had before it in the *Barker* case a totally different situation from that here presented.

12. The *Barker* case is no more binding upon this court than the other decisions of the Supreme Court inconsistent therewith.

Finally we submit that even if *Barker v. Harvey* were as identical with our case as it is different from it, this court would not be driven to an affirmance here. Its binding force is exactly as great as that of any other Supreme Court decision and no greater. When, therefore, it is found that each and every one of its assertions which appellees construe as favorable to them, is contradicted not by one but by a mass of decisions of the same tribunal, this court is either free to exercise an independent judgment,

or, if there is any constraint, it is obliged to follow the imposing array of cases upholding appellant's position. So far as authority goes, each one of them is as compelling as the Barker case.

We submit that the reasons presented for reversal are conclusive. Bearing in mind the sacredness and dignity of the Indian title, which yet is held by a helpless people, **non sui juris**, needing and uniformly receiving the fostering care of courts and Congress alike; the recognition and protection of it by Mexico when the fee title passed into private ownership; the treaty pledge of our national faith to preserve it; the tenderness for similar Indian rights shown by Congress in synchronous and subsequent enactments; and the established fact that throughout our history the Indian title has never been extinguished casually, silently or without compensation, the Court will approach the Act of 1851 looking to find these things respected therein and not nullified.

It will observe that under appellant's construction the Act is a plain, just and reasonable enactment, consistent with the above principles, well adapted to distinguish private land from public domain, but leaving the Indian rights attaching to either to await the action of Congress, enlightened by the report of the commission on that subject. It will find on the other hand that appellees' theory of the act contemplates an outrageous injustice, involves amazing absurdities, perverts the plain meaning of language, violates established principles of construction, contradicts doctrines repeatedly an-

nounced by the Supreme Court, including the general principles just stated above, and rests on a single case distinguishable both in fact and law from the case at bar.

The decision of the District Court should be reversed with directions to overrule the motion to dismiss and to fix a time for defendants to answer.

Respectfully submitted,

JOSEPH C. BURKE,

United States Attorney,

GEORGE A. H. FRASER,

Special Assistant to the

Attorney General,

Attorneys for Appellant.

No. 3856.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Title Insurance and Trust Company,
a corporation, Security Trust and
Savings Bank, a corporation, Harry
Chandler, O. P. Brant, M. H. Sher-
man and E. P. Clark,
Appellees.

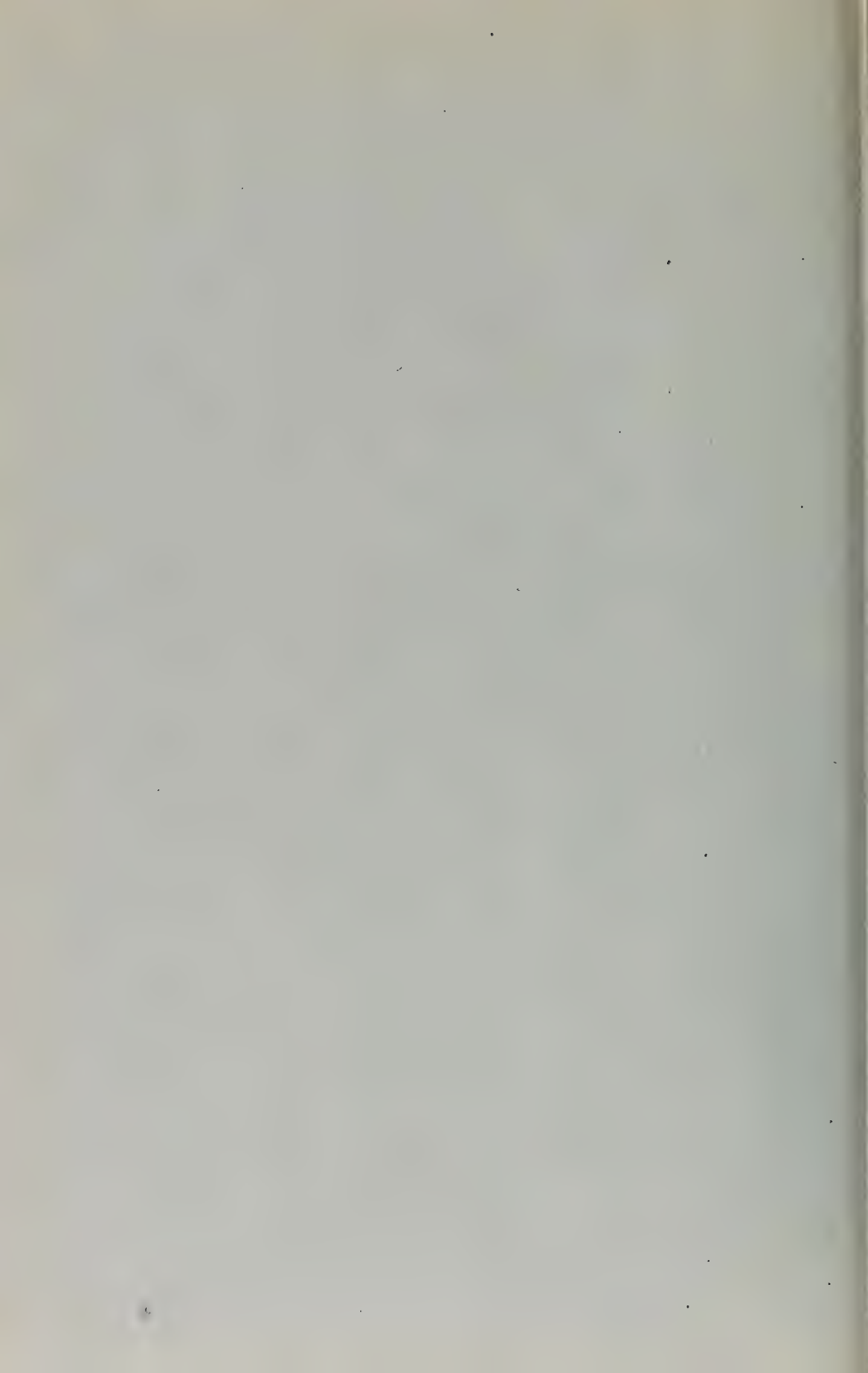
BRIEF FOR APPELLEES.

FILED

OCT 2 - 1922

F. D. MONCKTON,
CLERK.

O'MELVENY, MILLIKIN,
TULLER & MACNEIL,
WALTER K. TULLER,
Attorneys for Appellees.



No. 3856.

IN THE

**United States
Circuit Court of Appeals,**

FOR THE NINTH CIRCUIT.

United States of America,

Appellant,

vs.

Title Insurance and Trust Company,
a corporation, Security Trust and
Savings Bank, a corporation, Harry
Chandler, O. P. Brant, M. H. Sher-
man and E. P. Clark,

Appellees.

BRIEF FOR APPELLEES.

Learned counsel for appellant, in their hundred odd pages of brief filled with evidences of much labor and learning, seek to induce this court to set aside rules of property established by the decisions of the highest court of this state and this nation that have stood unchallenged for nearly a quarter of a century and on the basis of which innumerable property transactions have taken place and investments running into untold millions and perhaps hundreds of millions of dollars have been made. Since the decision in the case

of *Barker v. Harvey*, by the Supreme Court of California in 1899 (reported in 126 Cal., page 262), and the affirmance of that decision in the unanimous opinion of the Supreme Court of the United States in 1901 (181 U. S. 481), the legal world and the business world have understood that the questions therein decided were settled. They certainly were entitled so to consider in the face of the unanimous decision of the Supreme Court of the United States, which directly overrules every contention advanced by appellant here. As above noted, transactions involving untold millions have been made on the faith of that and previous similar decisions. Ranches have been bought and sold and sold again. Subdivisions have been made. Towns and cities have grown up on property that was once used by Indians, the same as the property here in question, all on the faith of those decisions. These appellees purchased the property here in question in 1916 after the decision referred to had stood unchallenged for fifteen years. [Tr. p. 5.] For nearly a quarter of a century these decisions have stood unchallenged—the admitted and unquestioned law of the land. Learned counsel now seek to have this court reopen the question, overrule the decisions of the Supreme Court of the United States, and introduce confusion and chaos into innumerable titles to property. We assume that it needs no citation of authorities to show that under such circumstances and after such a lapse of time, the court will not reopen such question, but that the law which has stood for so many years may be deemed the settled law of the land.

Learned counsel for appellant suggest several times that appellees rely upon only one decision, the case of *Barker v. Harvey*, above referred to (126 Cal. 262 and 181 U. S. 481). This is not strictly true, for the decisions of the Supreme Court of the United States rendered prior to the decision in *Barker v. Harvey* made that decision inevitable and led the Supreme Court of California to overrule its previous decision in the case of *Byrne v. Alas*, 74 Cal. 628, and similar decisions, and to announce the rule in *Harvey v. Barker* which was affirmed on appeal to the Supreme Court of the United States. But the very fact that the rule of *Barker v. Harvey* has stood unchallenged and unquestioned during all the years since it was rendered, that it has been accepted and acted upon as the law, both by the courts, the bar and the business world, makes it all the more important that the rule of law which it announces shall not now be reopened.

Every contention here advanced by appellant was advanced in *Barker v. Harvey* and every such contention was expressly and directly overruled in that case. Learned counsel evidently appreciate this fact. They argue at length that the decision as announced by the Supreme Court of the United States is wrong, assert that it is mere dictum, and at the conclusion of their brief endeavor to distinguish it by dwelling upon minor differences of fact between that case and the case at bar which have no bearing upon the principles of law announced.

Certainly nothing more will be necessary for this court than to read the decision in *Barker v. Harvey* to

see that the propositions of law there announced are absolutely determinative of the case at bar, and that the decision rendered in this case by the learned trial court cannot be reversed except by overruling that case. Whatever this court might think of the merits of the legal question involved, were it an open question, still, if the decision in *Barker v. Harvey* is to be overruled it must be done by the court which announced it, and until so overruled must stand as the law of the land.

The facts in *Barker v. Harvey*, as stated by the Supreme Court (181 U. S. at page 482) were as follows:

“The facts in the cases are so nearly alike that it is sufficient to consider only the first. The land in question is within the limits of the territory ceded to the United States by the treaty of Guadalupe Hidalgo, February 2, 1848. 9 Stat. 922. Generally speaking, the plaintiffs claim title by virtue of a patent issued to John J. Warner on January 16, 1880, in confirmation of two grants made by the Mexican government. On the other hand, the defendants do not claim a fee in the premises, but only a right of permanent occupancy by virtue of the alleged fact that they are Mission Indians, so called, and had been in occupation of the premises long before the Mexican grants, and, of course, before any dominion acquired by this government over the territory; insisting, further, that the government of Mexico had always recognized the lawfulness and permanence of their occupancy, and that such right of occupancy was

protected by the terms of the treaty and the rules of international law.”

The patent to Warner, under which plaintiffs claimed, contained the identical language with regard to the interests of third persons which is contained in the patent under which appellees claim in the case at bar, to-wit:

“But with the stipulation that in virtue of the 15th section of the said Act (March 3, 1851) the confirmation of this claim and this patent ‘shall not affect the interests of third persons.’ ”

It was held that the defendants had no right or interest in the land and that the plaintiffs should have a decree quieting their title.

It was contended there, as it is contended here, that the Indians’ right of occupancy was protected by the treaty of Guadalupe Hidalgo. The answer of the Supreme Court was that this was purely a political question. That it was met by Congress by the Act creating the Land Commission requiring all persons claiming any land in the ceded territory to present their claims to the Commission and have their rights thereto fixed and adjudicated, *and that a failure so to present such claims and have them adjudicated worked an abandonment of all such rights*. The court pointed out that it had already held in *Botiller v. Dominguez*, 130 U. S. 238, and numerous other cases down to and including *Florida v. Furman*, 180 U. S. 402, that this applied not only to incomplete or inchoate rights or titles such as were claimed by the Indians, but even to complete

and perfect titles. Referring to the act, the court, quoting from *Thompson v. Los Angeles Farming etc. Co.*, 180 U. S. 72, said (page 490):

“ ‘Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted *but required* all claims to be presented to the board, and *barred all from future assertion* which were not presented within two years after the date of the act.’ ” (Italics ours.)

It was contended there, as it is contended at great length in the brief of appellant in this case, that the Indians were not required to present their claim to occupy lands to the Land Commission. This claim was expressly overruled and held untenable. (See pages 490 to 492.) Among other things, the court said (page 490):

“As between the United States and Warner, *the patent is as conclusive of the title of the latter as any other patent from the United States is of the title of the grantee named therein.* As between the United States and the Indians, their failure to present their claims to the land commission within the time named made the land within the language of the statute ‘part of the public domain of the United States.’ Public do-

main' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' * * * So far, therefore, as these Indians are concerned the land is rightfully to be regarded as part of the public domain and subject to sale and disposal by the Government, and the Government has conveyed to Warner." * * *

"If these Indians had any claims founded on the action of the Mexican government they abandoned them by not presenting them to the commission for consideration, and they could not, therefore, in the language just quoted, 'resist successfully any action of the government in disposing of the property.' If it be said that the Indians do not claim the fee, but only the right of occupation, and, therefore, they do not come within the provision of section 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government,' it may be replied that a claim of a right to permanent occupancy of land is one of far-reaching effect, *and it could not well be said that lands which were burdened with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States.* There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of

some prior government to a right of permanent occupancy, for in the latter case the right, *which is one of private property*, antecedes and is superior to the title of this government, and limits necessarily its power of disposal. Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, *if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy.*" (Italics ours.)

The direct repugnance of appellant's arguments to the decision in *Barker v. Harvey* is well illustrated by its arguments on pages 32 and 33 of its brief herein. It contends that even though the Indians never presented any claims to the land commission, that, unless acquired by the government, their superior right to the land endures "for the tribal life, i. e., *throughout the successive generations through which the tribe endures*" (page 32). And again they argue (on page 33) that where the government granted the fee by patent, after adjudication by the land commission as in the case at bar, "The fee which ordinarily would carry full right of possession and use, *is for the time being only a naked fee.*" By the words, "for the time being," the appellant clearly means for the tribal life, that is, "throughout the successive generations through which the tribe endures." To hold as appellant seeks to have this court hold, would be to bring about this very condition and would result in a state of chaos of land titles that simply staggers the imagination.

It was contended in *Barker v. Harvey*, as it is contended at great length in the case at bar, that the rights of the Indians were saved by the provision in the patent, which was identical with the provision in the patent here involved, to the effect that the patent should not "affect the interests of third persons." The court answered this contention in the following language, (pages 490-491):

"It is true that the patent, following the fifteenth section of the act, in terms provides that the patent shall not 'affect the interests of third persons,' but who may take advantage of this stipulation? This question was presented and determined in *Beard v. Federy*, 3 Wall. 478, and the court, referring to the effect of a patent, said (pp. 492, 493):

'When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is, therefore, record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. * * * The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles such as

will enable them to resist successfully any action of the government in disposing of the property.' ”

It was contended in *Barker v. Harvey*, as it is contended at great length here, that “the Indians were prior to the cession the wards of the Mexican government and by the cession became the wards of this government; that therefore the United States are bound to protect their interests and that all administration, if not all legislation, must be held to be interpreted by, if not subordinate to, this duty of protecting the interests of the wards.” This contention the court answers by pointing out that this obligation is one which rests upon the political department of the government and that “this court has never assumed, in the absence of congressional action, to determine what would have been appropriate legislation or to decide the claims of the Indians as though such legislation had been had.” The court then pointed out that Congress had expressly required the land commission to report on these Indians; that it is assumed that the commission has performed that duty and that Congress did all that it deemed necessary in the matter, and if it failed to act, it is fairly to be deduced that Congress considered that they had no claims which called for special action. (See pages 492-493.)

It is thus to be seen that *Barker v. Harvey* expressly takes up and answers nearly every argument advanced by appellant in the case at bar, and that it does directly and in terms decide adversely every contention which appellant here makes. Indeed, when the court decides

that whatever rights the Indians had or claimed, they *abandoned them* by not presenting them to the land commission within the time specified in the statute, the entire case of appellant falls to the ground. Appellant in the case at bar presents two branches to the argument as to why the Indians were not required to present their claims: First, that their claims antedated either the Mexican or the American law; second, that their claims have been recognized and fortified by the language of the Mexican grant. But as has already been noted in *Barker v. Harvey*, the court directly met and overruled both these contentions in the language which we have quoted from pages 491-492 of the opinion. However much learned counsel may dwell upon and seek to magnify minor and immaterial differences between the facts in *Barker v. Harvey*, and the case at bar, it cannot be disputed that that decision squarely holds that by failing to present them to the land commission, the Indians waived and abandoned any claim that they had either arising out of natural law or of any confirmation by the Mexican government. Likewise, it cannot be denied that for nearly a quarter of a century both the legal and business world has acted upon this decision as the established law of the land. On the basis of it vast properties have been sold and sold and sold again; the properties have been subdivided and developed; towns and cities have grown up; titles of inestimable value have changed hands time and again, all in reliance upon this, the unanimous decision of the highest court of the land. So long as that decision stands, the case of appellant

must fall to the ground. We do not believe that any court will, at this date, reopen the question. But certain it is that no court except the court which rendered that decision can reopen it.

Learned counsel for appellant contends that the entire case of appellees rests on the decision of *Barker v. Harvey*. If this were true, it would be a complete answer to appellant's case. But such is by no means the case. *Barker v. Harvey* does, it is true, squarely decide that appellant's case is without merit, and naturally we rest primarily upon that decision. But if *Barker v. Harvey* had never been decided, still the other decisions of the Supreme Court of the United States rendered prior thereto would lead irresistibly to the same result that was there announced. As we have already called to the court's attention, this is so true that the Supreme Court of California, in deciding the case of *Barker v. Harvey*, was forced to and did overrule its previous decisions. A number of the decisions of the United States Supreme Court rendered prior to *Barker v. Harvey* might be cited, but for our present purpose it is sufficient to cite the following:

Beard v. Federy, 3 Wall. 478;

Botiller v. Dominguez, 130 U. S. 238;

Knight v. U. S. Land Ass'n, 142 U. S. 161;

Thompson v. Los Angeles Farm & Milling Co.,
180 U. S. 72.

In *Beard v. Federy* the facts were these: The Bishop of Monterey had presented a claim to the land

commission for confirmation to him of certain Mission lands, claiming that under the laws of Spain and the laws of Mexico he was entitled to church property without any formal grant. His claim was confirmed by the commission and the patent issued in due course. Federy, claiming title through the Bishop of Monterey, brought an action of ejectment against Beard, who claimed under an alleged grant of the same lands from one Pico, governor of California. This alleged grant, however, had never been presented to the commission for confirmation. On the trial, the court excluded all evidence of the grant of Governor Pico. Judgment was rendered in favor of Federy and defendant appealed to the Supreme Court of the United States. The judgment was affirmed. The case received elaborate consideration in an opinion written by Mr. Justice Field and concurred in by the entire court. It was held that the legislation creating the land commission and providing that all claims not presented to it within a specified period for confirmation should be considered and treated as abandoned, is entirely constitutional; that the patent issued by the government, so long as it remains unvacated, is conclusive as against the government and all parties claiming under it; that the term, "third persons," mentioned in the fifteenth section of the act (against whom a decree and patent are not conclusive), does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the

government in disposing of the property. The opinion is too long to quote in full, and we respectfully refer the court to the official report. For the present we simply call attention to the following: On page 489 the court points out that all claims of right or title to real estate must be presented to the commission, even though they "rest only in the general law of the land," as is usually the case with the title of municipal bodies, under the Spanish and Mexican systems, to their common lands. Exactly the same considerations apply to the kind of title claimed for the Indians here. On page 490 the court points out that the statute, in effect, declares that if claims are not presented within the period designated, the government will not recognize nor confirm them, nor take any action for their protection, but that the claims will be considered and treated as abandoned. As to the effect of the patent, we would respectfully invite the court's attention to the discussion on pages 492-493. In the same discussion the court holds that the term "third persons," as used in the statute, means only those persons who hold such superior titles that they could successfully resist any action of the government in disposing of the property.

In *Botiller v. Dominguez*, 130 U. S. 238, the facts were as follows: Plaintiff brought an action in ejectment against defendants. The title of plaintiff was a grant made by the government of Mexico, but no claim thereon had ever been filed with the commission, and hence no patent had issued. Defendants claimed no title under the Mexican government, but were settlers

who had entered upon the land to take up preemption or homestead claims. Plaintiff proved a perfect title under the Mexican law and the trial court rendered judgment in his favor. This was affirmed by the Supreme Court of California. The case was then appealed to the United States Supreme Court. The question was squarely (presented) as to whether a title that was *perfect* under the Mexican law was lost through not being presented for confirmation to the commission. In a unanimous decision delivered by Mr. Justice Miller, it was held that the title even though perfect under the Mexican law was lost and abandoned if not presented for confirmation, and the judgment of the California courts was reversed. The opinion in this case also is too long for extensive quotation. The court pointed out that a final and authoritative determination of titles in the new country was necessary; that it must be known as to what property some person or persons could claim a private title or right and as to what property the government of the United States could say "this is my property," and so make any disposition as it chose; that this necessity applied with equal force to perfect titles and to imperfect or inchoate titles; that there was nothing unconstitutional or improper about requiring all persons who claim titles of any kind or nature to come into court and set them up; that

"It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts rights or exercises powers over

property may be called before the proper tribunals to sustain them.”

The court quoted from previous opinions showing that it had already been held that the Act of 1851 comprehended “all private claims to land in California” and also

“These acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline. All claims to land that are withheld from the board of commissioners during the legal term for presentation, *are treated as non-existent*, and the land as belonging to the public domain.” (Page 253.) (Italics ours.)

In *Knight v. U. S. Land Association*, 142 U. S. 161, there was involved the question of the right of the Pueblo of San Francisco to certain lands lying below tidewater. The case was a somewhat complicated one on account of various differences of fact of no particular importance to the case at bar. The importance of the decision for the purpose of the case at bar is this. The court held (page 184) that the patent which it issued to the Pueblo of San Francisco upon confirmation of its claim by the land commission

“is conclusive not only as against the government and all parties claiming under it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court.”

The court then reviews a number of its previous decisions, including *Beard v. Federy, supra*, from which it quotes at length.

In *Thompson v. Los Angeles Farming & Milling Co.*, 180 U. S. 72, plaintiff sued in ejectment, the suit involving certain lands of the Rancho ex-Mission de San Fernando. Plaintiff derived title from a deed of grant made by Governor Pico, then governor of California, in 1846. This grant had been confirmed by the commissioners and a patent issued on such confirmation. The defense urged was that the grant by Governor Pico was illegal and invalid on its face for two reasons: First, because it was *ultra vires* of his authority, and second, because the lands attempted to be granted were lands belonging to the Mission of San Fernando and not legally subject to the granting power of the governor. It was also claimed that the Board of Land Commissioners had no jurisdiction over the matter because these facts appeared on the face of the proceedings before that board. In the trial court and the Supreme Court of California plaintiff recovered judgment, and on appeal to the Supreme Court of the United States this judgment was unanimously affirmed. In the course of the opinion, referring to the broad powers of the Board of Land Commissioners, the court said:

“Legal procedure could not afford any better safeguards against error. Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all the pur-

poses of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted *but required* all claims to be presented to the board, and *barred all from future assertion* which were not presented within two years after the date of the act." (Italics ours.)

The court then cited and quoted from *Beard v. Federy, supra*, and *More v. Steinback*, 127 U. S. 70, reaffirming the doctrine that the only persons who might question the conclusive effect of the patent were those who held superior titles to enable them to resist successfully any action of the government in disposing of the property.

A number of other cases might be cited, but the foregoing are, we think, the principle ones and are sufficient to establish the proposition that even if the case of *Barker v. Harvey* had never been decided, the case attempted to be made out by the appellants here must necessarily have failed. The effect of these decisions, as we have already pointed out, was to lead the Supreme Court of California in deciding *Barker v. Harvey* to overrule its previous decisions and to leave to the Supreme Court of the United States in deciding the case but little to do except to quote from and re-announce the rule established by these authorities. It is clear, therefore, that until these cases, as well as *Barker v. Harvey*, are overruled, the case attempted to be made by appellants must fall.

Counsels' Attempt to Distinguish *Barker v. Harvey*.

In the last of their brief, learned counsel for appellant make some effort to distinguish *Barker v. Harvey* from the case at bar. They do not, however, make any attempt, so far as we have found, to distinguish it from the several cases which we have just cited. But their attempts to distinguish *Barker v. Harvey* are, we submit, entirely futile. They rest upon trifling differences of fact and do not at all go to the principles of law which *Barker v. Harvey* and the other cases to which we have last referred establish. In the first place, as an attempted distinction, they say that in *Barker v. Harvey* the Indians had voluntarily abandoned their occupancy of the land in question—in effect, say that the Supreme Court might have put its decision on this ground alone, and therefore conclude “the legal speculations in the first part of the *Barker* case are therefore dicta.” (Page 102.) Nothing could be more unsound. Even if it be conceded that the Supreme Court *might* have put its decision on the ground that the lands had been abandoned by the Indians, still it might equally well have put its decision on the ground on which it did put it—that by a failure to present their claims to the Land Commissioners the Indians abandoned any rights they might have had, whether those rights arose by general law or by the terms of a Spanish or Mexican grant. The fact is that the Supreme Court did squarely decide the case on the ground that the failure to present their claims amounted to an abandonment. It spent many pages

discussing this branch of the case, showing that on principle, as well as by its previous decisions, this conclusion was irresistible. With all due deference to the learned counsel for appellant, to say that all this is mere dictum approaches the point of absurdity. We say this in no spirit of censuring counsel. It is not the first time that attorneys who were seeking to have this rule overturned have been forced to contend that the decision of the Supreme Court of the United States settling a point against them was dictum. The same thing was urged by unsuccessful counsel in the case of *Botiller v. Dominguez*, from which we have heretofore quoted. (130 U. S. 238.) At page 254 of the opinion the Supreme Court refers to a similar contention by unsuccessful counsel there in this language:

“It is said by counsel for defendant in error that there would never have been any doubt upon this question were it not for certain dicta in the cases here referred to. We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, ‘dicta,’ for we feel bound to say that they were observations pertinent to the matter under consideration, and seem to have met the entire approbation of the court in whose behalf they were uttered; and as they embraced a very considerable period of time, during which a contrary opinion would have saved much labor to the court, we must believe that the opinions thus expressed without variation were the well-considered views of this court when they were delivered.”

When *Barker v. Harvey* was before the Supreme Court of California a similar argument was made with reference to the decision in *Botiller v. Dominguez*, and similar cases which we have referred to, by saying that they were mere dicta. In reply the court said (pages 275-276):

“Appellants’ counsel, to ward off the effect of these decisions, particularly the Botiller case, characterize much of the language used in such opinions as pure *dictum*. But the opinion in this latter case, as well as the others quoted, have been referred to and adopted by the same court in subsequent cases. In *Knight v. United States Land Assn, supra*, the court say: ‘The patent, being thus conclusive, can only be resisted by those who hold paramount title to the premises from Mexico and antedating the title confirmed.’ (*De Guyer v. Banning*, 167 U. S. 723.)

“When unable to meet and answer opinions of the court, it is a custom of counsel, which would be ‘more honored in the breach than the observance,’ to characterize the language used as mere *dictum*. The answer to such criticism is well stated in the Botiller case itself: ‘We are unable to perceive any sufficient reason for calling these expressions of the court, whose judgment must be final on the subject, *dicta*, for we feel bound to say that they were observations pertinent to the matter under consideration, and seem to have met the entire approbation of the court in whose behalf they were uttered, and, as they embrace a very considerable period of time during which a contrary opinion would have saved much labor to the court, we must believe that the opinions

thus expressed without variation were the well-considered views of this court when they were delivered.' ”

Little more need be said as to counsel's attempts along this line. The question as to whether the Indians lost any rights they might have by failing to present them to the Land Commission was squarely before the Supreme Court and was squarely decided, and such decision has never been questioned.

Counsel's suggestion that one of the grants involved in the Barker case did not contain a provision protecting the rights of the Indians as ground of distinction is equally without merit. If the provision contained in the Mexican grant is the basis of the claim of the Indians' rights, it affords an extra and additional ground for requiring them to present their claim, since as to this, their claim of right is clearly founded upon an action of the Mexican government. It being the established law, as shown by the Botiller and other cases, that even a perfect grant of a fee under the Mexican government is lost and abandoned if not presented to the Land Commission, *a fortiori*, such a claim as the one here involved is abandoned if not presented, and as already pointed out in the Barker case (pages 491-492) the court held that whether the claim rested upon a reservation in the patent or a mere natural right of occupancy, their rights were abandoned if not presented to the Land Commission for confirmation.

The argument that the decision on this and other points in *Barker v. Harvey* is mere dicta has already been sufficiently answered.

The other alleged grounds of distinction are so thoroughly answered by a mere perusal of the decision itself, that we will not further discuss them.

That the patent under which these appellees hold is conclusive against both the appellant and the Indians is settled by the decisions hereinbefore referred to.

We have not attempted to follow in meticulous detail all of the suggestions contained in appellant's brief, but have endeavored to point out that both on principal and by direct and oft-repeated decisions of the Supreme Court of the United States, the features which control this case are thoroughly settled. Neither have we consumed the time of the court in discussing many of the propositions of a general nature advanced by the counsel, or in reviewing the large number of cases which they cite that discuss Indian reservations and other general matters having no direct bearing on the issues here involved. We have endeavored to present those decisions of the highest court of the land which do deal directly with the questions here involved. That those decisions do settle the principles which determine this case and that such principles have stood without being questioned for nearly a generation, cannot, we think, be successfully disputed. These appellees derain their title through a patent of the United States issued on confirmation by the Board of

Land Commissioners. They purchased on the faith of that patent and the decisions of the highest court of this land that it gave them a clear title free from any such claims as are now asserted. Under those decisions and the settled law of the land, they cannot now have that title transformed into a mere “naked fee,” (to use the expression of counsel), charged with the burden of a prior and superior right in these Indians so long as the tribal life shall last.

The case of appellant is without merit and the decision rendered by the learned trial court is the only one that could be rendered consistent with the law of the land. That judgment should be affirmed; all of which is respectfully submitted.

O'MELVENY, MILLIKIN,
TULLER & MACNEIL,
WALTER K. TULLER,
Attorneys for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff in Error,

VS.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Montana.

FILED

APR 21 1922

F. D. MONCKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant in Error.

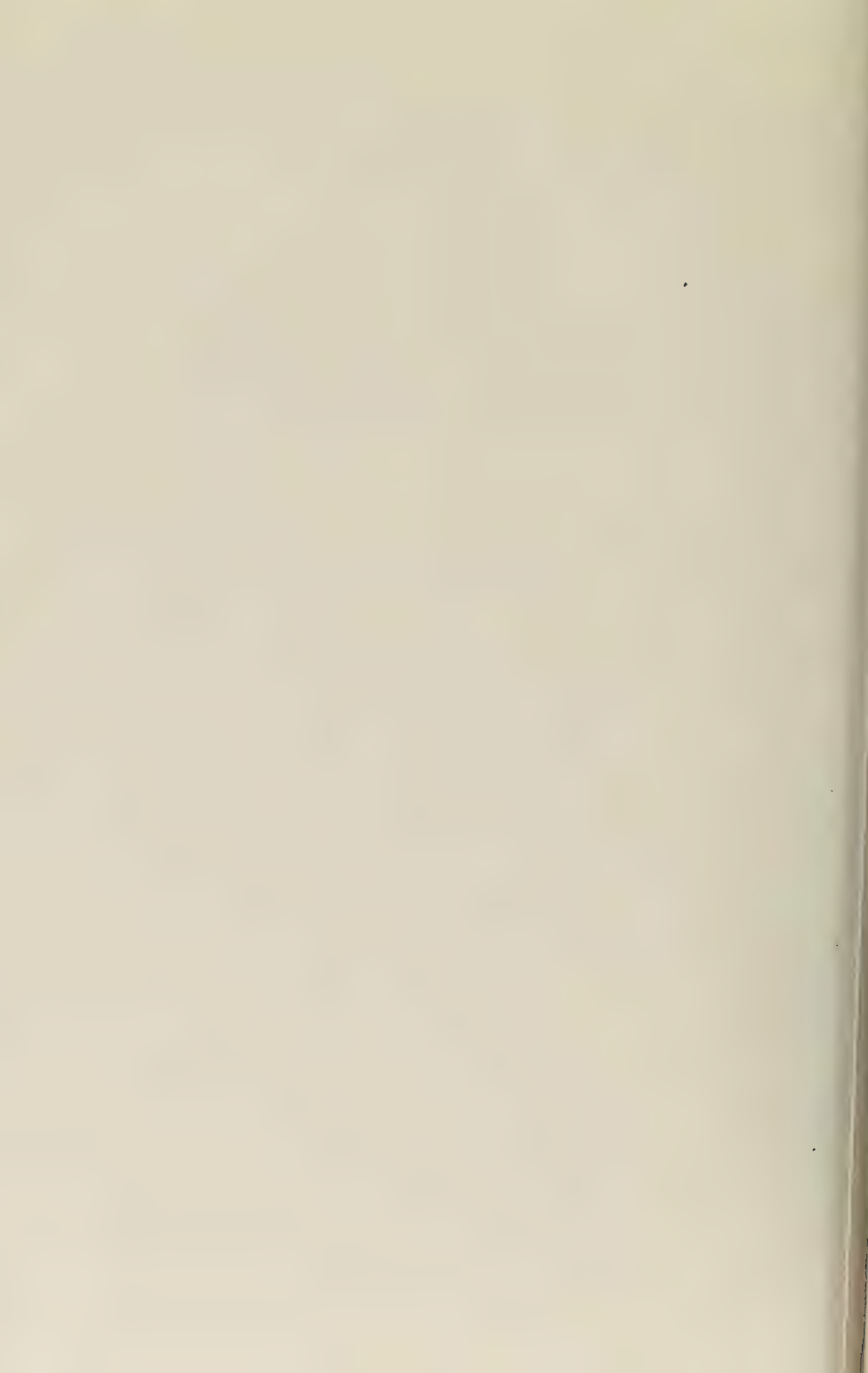
Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Montana.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint.	2
Answer of Court to Writ of Error.	18
Assignments of Error.	12
Bond on Appeal.	14
Certificate of Clerk U. S. District Court to Transcript of Record.	20
Citation on Writ of Error.	15
Decision.	6
Demurrer to Amended Complaint.	5
Judgment.	11
Names and Addresses of Attorneys of Record	1
Praecipe for Transcript of Record.	20
Writ of Error.	17



Names and Addresses of Attorneys of Record.

Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Attorneys for Plaintiff in Error.

Hon. W. D. RANKIN, Attorney General of the State of Montana, of Helena, Montana,

Attorney for Defendant in Error.

In the District Court of the United States in and for the District of Montana.

Case No. 956.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant.

BE IT REMEMBERED, that on February 11, 1922, by leave of Court first had and obtained, an amended complaint was duly filed herein, being in the words and figures following, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District
of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Amended Complaint.

Now comes the plaintiff, and by this, its amended complaint herein, complains of the defendant and alleges:

I.

That the plaintiff is now, and has been since prior to January 1, 1921, a corporation organized and existing under and by virtue of the laws of Colorado, and a citizen of said State.

II.

That the defendant is, and has been since prior to January 1, 1921, the duly elected, qualified and acting treasurer of the State of Montana, and a resident and citizen of said State.

III.

That the plaintiff is now and has been since prior to January 1, 1921, engaged in and carrying on the business of selling gasoline and distillate in the State of Montana, and during the period from and including January 1, 1921, to and including March 4, 1921, actually sold and delivered in said

state, gasoline and distillate to the amount of 1,-305,874 gallons.

IV.

That the defendant, as such state treasurer, demanded of this plaintiff the payment of a license tax of one cent per gallon [2] for each gallon of gasoline and distillate so sold during the period aforesaid, and in making said demand assumed that Chapter 156 of the Session Laws of Montana 1921 required the payment of such tax, and that he was authorized thereby to demand and collect the same.

V.

That if said statute is construed and held to require this plaintiff to pay a license of one cent per gallon for each gallon of gasoline and distillate sold during said period for conducting, engaging in and carrying on such business after March 4, 1921, it is in conflict with the fourteenth amendment to the Constitution of the United States in that it denies to plaintiff the equal protection of the laws by requiring plaintiff and others engaged in and carrying on such business prior to March 5, 1921, to pay a higher license tax for engaging in and carrying on such business after March 5, 1921, the date when said statute went into effect, than those who commenced and carried on such business on or after said date; and if said statute is construed and held to be retroactive, and to require the payment of such license tax for having engaged in and carried on such business from and including January 1, 1921, to and including March 4, 1921, it is in conflict with the said fourteenth amend-

ment in that it deprives plaintiff of its property without due process of law.

VI.

That on August 3d, 1921, this plaintiff complied with the demand so made, and paid the said defendant, as state treasurer, the sum of \$13,058.74, which was at the rate of one cent per gallon for the gasoline and distillate so sold by plaintiff in the State of Montana during the period aforesaid.

VII.

That plaintiff, deeming the said license fee or tax demanded [3] and paid as aforesaid, unlawful, paid the same and the whole thereof under protest to the said defendant, as state treasurer, and the amount so paid has been deposited by said defendant, as state treasurer, in a special fund, designated "Protest License Fund," and is now held by him in said fund.

WHEREFORE, plaintiff demands judgment for the said sum of \$13,058.74, with interest thereon and costs of this action.

GUNN, RASCH & HALL,
Attorneys for Plaintiff. [4]

State of Montana,
County of Lewis and Clark.

M. S. Gunn, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason he makes this verification is because

there is no officer of the plaintiff now within the County of Lewis and Clark, State of Montana, wherein affiant resides.

M. S. GUNN.

Subscribed and sworn to before me this 11th day of February, 1922.

[Seal]

E. M. HALL,

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires Aug. 5th, 1922.

Filed Feb. 11, 1922. C. R. Garlow, Clerk.

Thereafter, to wit, on February 11, 1922, demurrer to amended complaint was duly filed herein, being in the words and figures following, to wit:
[5]

In the District Court of the United States, District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant.

Demurrer to Amended Complaint.

Comes now the defendant in the above-entitled action and demurs to the amended complaint of the plaintiff on file herein upon the grounds and for

the reason that the said amended complaint does not state facts sufficient to constitute a cause of action.

WELLINGTON D. RANKIN,
Attorney General of the State of Montana, Attorney
for Defendant.

Filed Feb. 11, 1922. C. R. Garlow, Clerk.

Thereafter, to wit, on the 24th day of February, 1922, the decision of the Court sustaining the demurrer to the amended complaint was duly filed herein, being in the words and figures following, to wit: [6]

In the District Court of the United States in and
for the District of Montana.

No. 956.

THE CONTINENTAL OIL CO.

vs.

WALKER, State Treasurer.

Decision.

An act of the legislature of Montana approved March 5, 1921 (17 Sess. 288), provides in respect to dealers in gasoline and distillate, that "every dealer shall for the year 1921, and each year thereafter, when engaged in such business in this state, pay to the State Treasurer, . . . a license tax for engaging in such business in this state, equal to one cent for each gallon . . . sold or dis-

tributed by such dealer in this state during each year," and that "such license tax shall be paid in quarterly installments for the quarters ending, respectively, March 31, June 30, September 30, and December 31, in each year, beginning with the quarter ending March 31, 1921," and be paid within thirty days after the end of the quarter. The Act also provides that dealers shall keep records of sales, in form prescribed by state authority, and open to the latter's inspection. Penalties for violation of the Act are prescribed. Plaintiff alleges that it is and has been such dealer since prior to Jan. 1, 1921, and from Jan. 1, 1921, to and including March 4, 1921, it sold and delivered in Montana 1305874 gallons; that thereon and upon demand and under protest it paid to defendant as for said tax, \$13,058.74; that if said act be construed to require such payment as a license tax for carrying on such business after March 4, 1921, it denies to plaintiff that equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment. The relief asked is judgment for said sum.

Defendant demurs to the sufficiency of the complaint.

To deal with plaintiff's contentions in order, the first is that to measure the tax by sales made before the act's approval is to give the act a retroactive effect; that [7] Sec. —, R. C. Mont., provides no statute "is retroactive unless expressly so declared"; and that the act does not expressly so declare. Whether or not a statute that merely

refers to things past for a measure in respect to things future, is retroactive within the meaning of Sec. —, *supra*, it is believed that the act on its face conveys the meaning that sales past and before the act's approval shall to limited extent be the measure of the tax for the privilege of engaging in the business in the future and after said approval. The act says plainly enough that dealers "for the year 1921" and thereafter shall pay the tax in respect to sales "during each year," in "quarterly installments," "beginning with the quarter ending March 31, 1921." "Year," "year 1921," and "quarter ending March 31, 1921," as generally in statutes import the calendar year and quarter and without apportionment for that part of the year and quarter that had expired before the act's approval. And this is retroactive intent "expressly so declared" within the meaning of Sec. —, *supra*.

By analogy, see Curtis' Case, 49 Mont. 145.

Plaintiff's second contention is that to give the act this limited retroactive effect is to exact a license tax for having done business prior to the act; that the legislature is without authority to do this, because Art. 12, Sec. 1, of the state constitution provides that "the legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state," and Art. 3, Sec. 29 thereof, provides that "the provisions of this constitution are mandatory and prohibitory"; and that the import is that license taxes

can be imposed in respect only to business done subsequent to the act.

It is probable this construction of the constitution is right, but it is believed that plaintiff's application of it is wrong. The tax is not upon business done before the act was approved, but is upon the privilege of doing business after the approval. Although plaintiff did much [8] business in 1921 before the act was approved, had it ceased before the approval it would not have been subject to the act and tax. It did not cease, however, and continuing in business it is subject to the act and tax, the latter in part measured by the business done in 1921 before the act's approval.

The act approved, found plaintiff exercising the privilege of "doing business." This satisfies the constitution aforesaid, and to in part measure the tax upon the privilege of doing business, by business done, does no violence to the constitution. It is not uncommon to wholly measure license, privilege or excise taxes for any year by the business receipts of the preceding year. Although in some respects the act is not clear, it is believed this construction accords with what is permissible, and ascertains and sustains the legislative intent.

Plaintiff's last contention is that to thus measure the tax, imposes upon it a greater proportionate tax for the first quarter and year, than upon dealers engaging in business on or after the act's approval on March 5, 1921, and that this is unreasonable classification of dealers, denies to plaintiff equal

protection of the law, and deprives it of property without due process of law.

It is clear that in proportion to business done in the interval from March 5, 1921, to March 31, 1921, plaintiff paid a much greater tax for the privilege of doing business than did dealers who newly engaged therein during said interval,—if there were any. But since the Fourteenth Amendment does not prevent a state from adjusting taxation in all proper and reasonable ways, to that end it may classify occupations and those engaged in any particular occupation, according to its views of what is just and expedient, subject only to the limitation that in the light of the circumstances there must be reasonable if poor grounds therefor. So in respect to the act involved and which may have worked the disparity in taxes suggested aforesaid, the legislature no doubt was moved thereto by [9] considerations that dealers engaged in business before March 5, 1921, had an advantage in known location, good will and established trade which rendered the privilege for the balance of the year or quarter more valuable to them than was the like privilege to newcomers in the business; and that because thereof that value could reasonably be measured in part by business done during 1921 before the date aforesaid of the act.

There is sufficient reason in it to avoid the ban of the Fourteenth Amendment.

See *Clement Bank vs. Vermont*, 231 U. S.

All taxation involves some lack of uniformity, some inequality. This is strikingly illustrated in property taxes. The owner upon March 1, though for but the day, pays the year's taxes, and the owner before and he after, pay nothing.

The demurrer is sustained.

Feb. 23, 1922.

BOURQUIN, J.

Filed Feb. 24, 1922. C. B. Garlow, Clerk.

Thereafter, to wit, on March 28, 1922, Judgment was duly entered herein in favor of the defendant, being in the words and figures following, to wit:
[10]

In the District Court of the United States, in and
for the District of Montana.

No. 956.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Judgment.

This cause having come on regularly for hearing upon the demurrer of the defendant to the amended complaint of the plaintiff herein, and said demurrer

having been sustained, and the plaintiff having declined to amend or plead further, on motion of the attorney for the defendant;

It is ORDERED, ADJUDGED AND DECREED that the amended complaint herein be, and the same is hereby dismissed, and that the defendant recover his costs taxed at the sum of two and 45/100 Dollars.

Entered March 28, 1922.

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk.

Thereafter, to wit, on March 28, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [11]

In the District Court of the United States, in and
for the District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Assignments of Error.

Comes now the above-named plaintiff, The Continental Oil Company, and presents and files, with

its petition for a writ of error herein, its assignments of error herein, as follows:

1. The Court erred in sustaining the demurrer of the defendant to the amended complaint in said action.

2. The Court erred in rendering judgment in said action, in favor of the defendant and against the plaintiff, dismissing the amended complaint of the plaintiff.

WHEREFORE, plaintiff prays that said judgment be reversed.

Dated this 28th day of March, 1922.

GUNN, RASCH & HALL.

Service of the foregoing assignments of error and receipt of a copy thereof is hereby admitted, this —— day of March, 1922.

_____,
Attorney for Defendant.

Filed March 28, 1922. C. R. Garlow, Clerk.
[12]

Thereafter, to wit, on March 29, 1922, bond on appeal was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, in and
for the District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, The Continental Oil Company, a corporation, as Principal, and the United States Fidelity and Guaranty Company, a corporation, duly authorized to do business as a surety company in the State of Montana, as surety, are held and firmly bound unto J. W. Walker, as State Treasurer of the State of Montana, in the sum of Five Hundred Dollars (\$500.00), to be paid said J. W. Walker, as State Treasurer of the State of Montana, for which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 28th day of March, 1922.

WHEREAS, the above-named plaintiff has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause:

NOW, THEREFORE, the condition of this obligation is such that, if the above-named plaintiff shall prosecute said writ to effect and answer all costs, if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

Dated this 28th day of March, 1922.

THE CONTINENTAL OIL COMPANY,

By M. S. GUNN,

Its Attorney. [13]

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal]

By CLINTON O. PRICE,

Its Attorney in Fact.

The foregoing bond is hereby approved, this 28th day of March, 1922.

BOURQUIN.

Filed March 29, 1922. C. R. Garlow, Clerk.

Thereafter, to wit, on March 29, 1922, citation was duly filed herein, the original citation being hereto annexed and being in the words and figures following, to wit: [14]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To J. W. Walker, as State Treasurer of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, His Attorney:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Montana, wherein The Continental Oil Company, a corporation, is plaintiff in error and J. W. Walker, as State Treasurer of the State of Montana, is defendant in error, to show cause, if any there be, why the judgment is said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 28th day of March, 1922.

BOURQUIN,

United States District Judge for the District of Montana.

Service of the foregoing citation is hereby acknowledged, this 29th day of March, 1922.

WELLINGTON D. RANKIN,

Attorney General for the State of Montana, and
Attorney for Defendant. [15]

[Endorsed]: No. 956. United States Circuit Court of Appeals, Ninth Circuit. The Continental Oil Company, a Corporation, Plaintiff in Error, vs. J. W. Walker, as State Treasurer of the State of Montana, Defendant in Error. Citation on Writ of Error. Filed March 29, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [16]

Thereafter, to wit, on the 29th day of March, 1922, writ of error was duly filed herein, the original writ of error being hereto annexed and being in words and figures following, to wit. [17]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the District of Montana,
GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before you, between The Continental Oil Company, a corporation, plaintiff, and J. W. Walker, as State Treasurer of the State of Montana, is defendant, a manifest error hath happened, to the great damage of the said The Continental Oil Company, plaintiff in error, as by its complaint appears:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 27th day of April next, in the said Circuit Court of Appeals, that the record and pro-

ceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, the 28th day of March, 1922, the one hundred and forty-sixth year of the Independence of the United States of America.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court for the District of Montana, Ninth Circuit.

Let the foregoing writ of error issue.

BOURQUIN,

District Judge.

Service of the foregoing writ of error and receipt of a copy thereof is hereby admitted, this 27th day of March, 1922.

WELLINGTON D. RANKIN,

Attorney for Defendant in Error. [18]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States, for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the Honorable, the United

States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

C. R. GARLOW,
Clerk.

By H. H. Walker,
Deputy Clerk. [19]

[Endorsed]: No. 956. United States Circuit Court of Appeals, Ninth Circuit. The Continental Oil Company, a Corporation, Plaintiff in Error, vs. J. W. Walker, as State Treasurer of the State of Montana, Defendant in Error. Writ of Error. Filed March 29, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [20]

Thereafter, to wit, on March 29, 1922, praecipe for transcript was duly filed herein, as follows, to wit:

In the District Court of the United States, in and
for the District of Montana.

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff,

vs.

J. W. WALKER, as State Treasurer of the State
of Montana,

Defendant.

Praeipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Pursuant to the writ of error issued in the above-entitled cause, you will please prepare, and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, a true transcript of the record in said cause, and the opinion of the Court on the demurrer to the amended complaint, and the assignment of errors, and all proceedings in the case.

Dated this 29th day of March, 1922.

GUNN, RASCH & HALL,
Attorneys for Plaintiff.

Filed March 29, 1922. C. R. Garlow, Clerk. [21]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 21 pages, numbered consecutively from 1 to 21, inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed, as appears from the original records and files of said court in my custody as such clerk; and I do further

certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of six & 80/100 Dollars, (\$6.80), and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 30th day of March, A. D. 1922.

[Seal]

C. R. GARLOW,
Clerk.

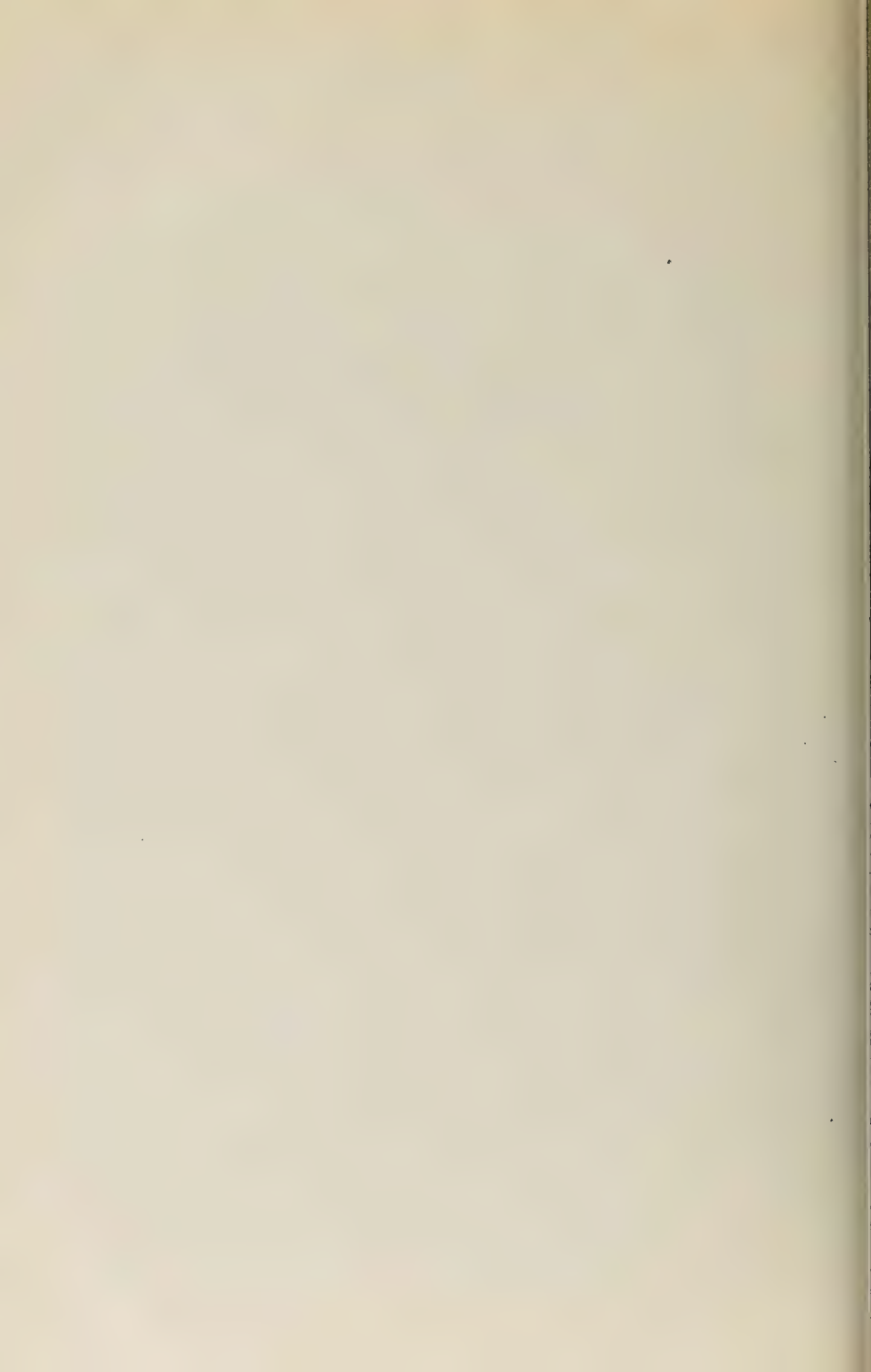
By H. H. Walker,
Deputy Clerk. [22]

[Endorsed]: No. 3857. United States Circuit Court of Appeals for the Ninth Circuit. The Continental Oil Company, a Corporation, Plaintiff in Error, vs. J. W. Walker, State Treasurer of the State of Montana, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed April 3, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



No. 3857

United States
Circuit Court of Appeals
For the Ninth Circuit

THE CONTINENTAL OIL COMPANY,
a Corporation,
Plaintiff in Error,

J. W. WALKER, as State Treasurer of the State of
Montana, *Defendant in Error.*

Brief for Plaintiff in Error

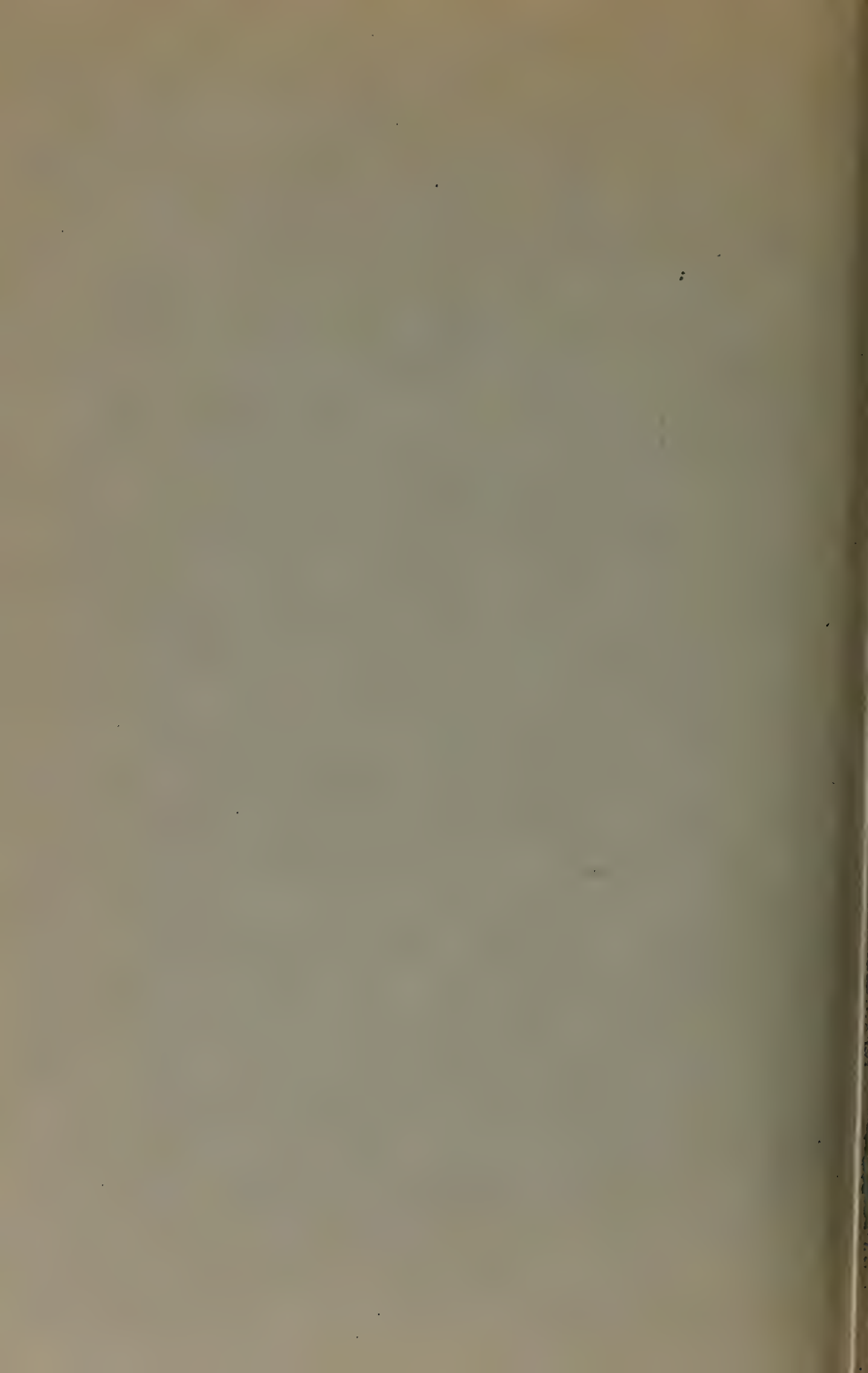
GUNN, RASCH & HALL,
Attorneys for Plaintiff in Error.

FILED

OCT 2 - 1922

F. D. MONCKTON

CLERK



United States
Circuit Court of Appeals
For the Ninth Circuit

THE CONTINENTAL OIL COMPANY,
a Corporation,
Plaintiff in Error,

J. W. WALKER, as State Treasurer of the State of
Montana, *Defendant in Error.*

Brief for Plaintiff in Error

STATEMENT OF CASE.

This is an action to recover the sum of \$13,058.74 license tax paid the defendant in error, under protest. A demurrer was interposed to the amended complaint and sustained, and thereupon a judgment was rendered dismissing the action.

In the amended complaint it is alleged:

“That the plaintiff is now and has been since prior to January 1, 1921, engaged in carrying on the business of selling gasoline and distillate in the State of Montana, and during the period from and including January 1, 1921, to and including March 4, 1921, actually sold and delivered in said state, gasoline and distillate to the amount of 1,305,874 gallons.

“That the defendant, as such state treasurer, demanded of this plaintiff the payment of a license tax of one cent per gallon for each gallon of gasoline and distillate so sold during the period aforesaid, and in making said demand assumed that Chapter 156 of the Session Laws of Montana 1921, required the payment of such tax, and that he was authorized thereby to demand and collect the same.

“That if said statute is construed and held to require this plaintiff to pay a license of one cent per gallon for each gallon of gasoline and distillate sold during said period for conducting, engaging in and carrying on such business after March 4, 1921, it is in conflict with the fourteenth amendment to the Constitution of the United States, in that it denies to plaintiff the equal protection of the laws by requiring plaintiff and others engaged in and carrying on such business prior to March 5, 1921, to pay a higher license tax for engaging in and carrying on such business after March 5, 1921, the date when said statute went into effect, than those who commenced and carried on such business on or after said date; and if said statute is construed and held to be retroactive, and to require the payment of such license tax for having engaged in and carried on such business from and including January 1, 1921, to and including March 4, 1921, it is in conflict with the said fourteenth amendment in that it deprives plaintiff of its property without due process of law.

“That on August 3rd, 1921, this plaintiff complied with the demand so made, and paid the said defendant, as state treasurer, the sum of \$13,058.74, which was at the rate of one cent per gallon for the gasoline and distillate so sold by plaintiff in the State of Montana during the period aforesaid.

“That plaintiff, deeming the said license fee or tax demanded and paid as aforesaid, unlawful, paid the same and the whole thereof under protest to the said defendant, as state treasurer, and the amount so paid has been deposited by said defendant, as state treasurer, in a special fund, designated ‘Protest License Fund,’ and is now held by him in said fund.”

The Act of the Legislative Assembly constituting Chapter 156 of the Laws of Montana of 1921, was approved and became effective March 5, 1921. Section 3 of the Act provides:

“Every dealer shall for the year 1921, and each year thereafter, when engaged in such business in this state, pay to the State Treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in such business in this state, equal to one cent for each gallon of gasoline and one cent for each gallon of distillate sold or distributed by such dealer in this state during such year.”

Section 6 provides:

“Each and every dealer, must within thirty (30) days after the quarter ending March 31st, 1921, and within thirty (30) days after the ending of each following quarter, make out in duplicate, on forms prescribed by the State Board of Equalization, and deliver to the State Treasurer, a statement showing the total number of gallons of gasoline and distillate sold by such dealer during the quarter, which was purchased by him in the original packages in which the same was shipped, transported or imported into this State; and the total amount due to the State of Montana as license taxes for such quarter.”

Section 7 provides:

“Each distributor and each dealer must, within thirty (30) days after the end of each such quarter, and at the same time the statement required by Section 6 of this Act is delivered to the State Treasurer, pay to the State Treasurer, the amount of the license tax shown by such statement to be due for the quarter for which the statement is made and filed.”

The question for determination is whether the tax for the quarter ending March 31st, 1921, should be measured by the number of gallons sold during that quarter, both prior and subsequent to the date the act was approved and became a law, or by the number of gallons sold between March 5th, 1921, the date of the approval of the Act, and March 31st, 1921.

ASSIGNMENT OF ERROR.

The court erred in sustaining the demurrer to the amended complaint.

BRIEF AND ARGUMENT.

Section 1 of Article XII of the Constitution of Montana, after providing that—

“The necessary revenue for the support and maintenance of the State shall be provided by the Legislative Assembly,”

by the taxation of all property, with certain exceptions, provides,

“The Legislative Assembly may also impose a license tax, both upon persons and upon corporations doing business in the State.”

It was by virtue of this constitutional provision that the statute under consideration was enacted.

The privilege of doing business, for which the license tax is required, is the privilege exercised after March 5, 1921, the date of the approval of the act. If the plaintiff in error had ceased business on the day the act was approved, there could be no liability for the payment of any license tax. It follows that, while the statute provides for the payment of a license tax “for the year 1921,” by those engaged in such business during the year, as a matter of fact the tax is required for only that part of the year during which business was carried on after March fifth.

When we consider that the statute imposes the license tax for engaging in business after the law went into effect, and not for having engaged in business prior to that date, the statute, so far as it relates to the year 1921, must be construed as though it had read,

Every dealer shall, for that part of the year 1921 after March 5, that he shall engage in such business, pay a license tax equal to one cent for each gallon of gasoline and distillate sold or distributed by him during such part of said year.

If the construction of Section 3 thus contended for is correct, Section 6 can have reference only to the number of gallons of gasoline and distillate sold

during the quarter ending March 31, 1921, after March 5th, the date of the approval of the Act.

The construction thus contended for is strongly supported by the provisions of Section 5 of the Act, which requires each dealer to keep a record "in such form as the State Board of Equalization shall require," showing the total number of gallons of gasoline and distillate sold by him, etc., and providing that "all such records shall at all times during the business hours of the day be subject to inspection by the State Board of Equalization, its members, agents or employees." Section 6 of the Act clearly contemplates that the record thus required to be kept shall be used as a basis for making the statement from which the amount of the tax is calculated. These provisions evidence a clear intent that the statute should have a prospective operation only.

It is, however, a general and well established rule of statutory construction that a statute should not be construed so as to have a retroactive operation, unless the language thereof imperatively calls for such a construction.

Dodge v. Nevada State Nat. Bank, 109
Fed. 726.

(Decided by this Court)

Schwab v. Doyle, decided by the Supreme
Court of the United States, May 1,
1922, Adv. Opinions, published by the
Lawyers Co-operative Publishing Com-
pany, No. 14, page 461.

This rule of statutory construction has been embodied in Section 3 of the Revised Codes of Montana of 1921, which provides:

“No law contained in any of the Codes or other statutes of Montana is retroactive, unless expressly so declared.”

To construe the statute as requiring the payment of a license tax, measured by the quantity of gasoline sold between January 1st and March 5th, 1921, would be giving it a retroactive effect.

Schwab v. Doyle, cited above.

The case of Schwab v. Doyle involved the construction of an Act of Congress, entitled: “Estate Tax Act” approved September 8, 1916, 39 Stat. at L., 777 to 780. The act provided for the imposition of a tax upon the transfer of the net estate of every person dying after the passage of the act,

“to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money’s worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.”

It appeared that one Augusta Dickel, in the month of April, 1915, had assigned and delivered

to a trust company stocks, bonds and securities of the declared value of one million dollars, and Dickel had died on September 16, 1916, or seven days before the approval of the said Act of Congress. Upon the assumption that the act was applicable to the assignment to the trust company, made by Augusta Dickel, a tax was imposed accordingly, and paid under protest. The action was to recover the tax. The Court, in the opinion, said:

“The initial admonition is that laws are not be to considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. Com. 455; *Eidman v. Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *White v. United States*, 191 U. S. 545, 48 L. ed. 295, 24 Sup. Ct. Rep. 171; *Gould v. Gould*, 245 U. S. 151, 62 L. ed. 211, 38 Sup. Ct. Rep. 53; *Story*, Const. Sec. 1398. The comment of *Story* is: ‘Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.’

“There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.

“The Act of September 8, 1916, is within the condemnation.

“There is certainly in it no declaration of retroactivity, ‘clear, strong, and imperative,’ which is the condition expressed in *United*

States v. Heth, 3 Cranch, 398, 413, 2 L. ed. 479, 483, also United States v. Burr, 159 U. S. 78, 82, 83, 40 L. ed. 82-84, 15 Sup. Ct. Rep. 1002.

“If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected.”

We respectfully submit that, for the same reason that it was held in Schwab v. Doyle, that the Act of Congress did not apply to prior transfers, the statute under consideration does not apply to sales made prior to its enactment.

* * * * *

No one, we take it, would contend that the Legislative Assembly could require the payment of a larger sum as a license tax for the business of selling gasoline and distillate from one individual or corporation than from another. This, however, would be the effect of the statute, if it is construed to apply to prior sales. The plaintiff sold, during the year 1921 prior to the 5th day of March, 1,305,874 gallons of gasoline and distillate. If it had commenced business on the 5th day of March, it could have conducted the business of selling gasoline and distillate for the balance of the year by the payment of a license tax, based on the number of gallons sold subsequent to March 5th. All others commencing business on March 5th had the same right. It follows, then, that to construe the statute as applying to prior sales operates to impose a higher tax upon those engaged in such business

prior to March 5th than is imposed upon those commencing such business on or subsequent to such date.

While the Legislative Assembly may classify for the purpose of taxation, a classification for the purpose of a license tax which would distinguish between those engaged in business at the time of the imposition of the tax and those who should commence business thereafter is, we submit, an unreasonable classification.

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150;

Barbier v. Connolly, 113 U. S. 27,
Connolly v. Union Sewer Pipe Co. 184 U. S. 540.

The lower court, in answer to the contention that the statute is violative of the equal protection clause of the Federal Constitution, said that:

“Dealers engaged in business before March 5, 1921, had an advantage in known location, good will and established trade which rendered the privilege for the balance of the year or quarter more valuable to them than was the like privilege to new-comers in the business.”

and for this reason it was permissible to require the payment of a higher license tax by those engaged in business at the time the law went into effect than is required of those who commenced business thereafter.

If the lower court's construction of the statute is correct, then if plaintiff in error had ceased business on March 5th, and had commenced business

again on the last day of the year 1921, it would have been required to pay a license tax based on the sales made during the year prior to March 5th, as well as on the sales made the last day of the year, notwithstanding under such circumstances it would have had no advantage over those who commenced business after March 5th—"in know location, good will and established trade."

* * * * *

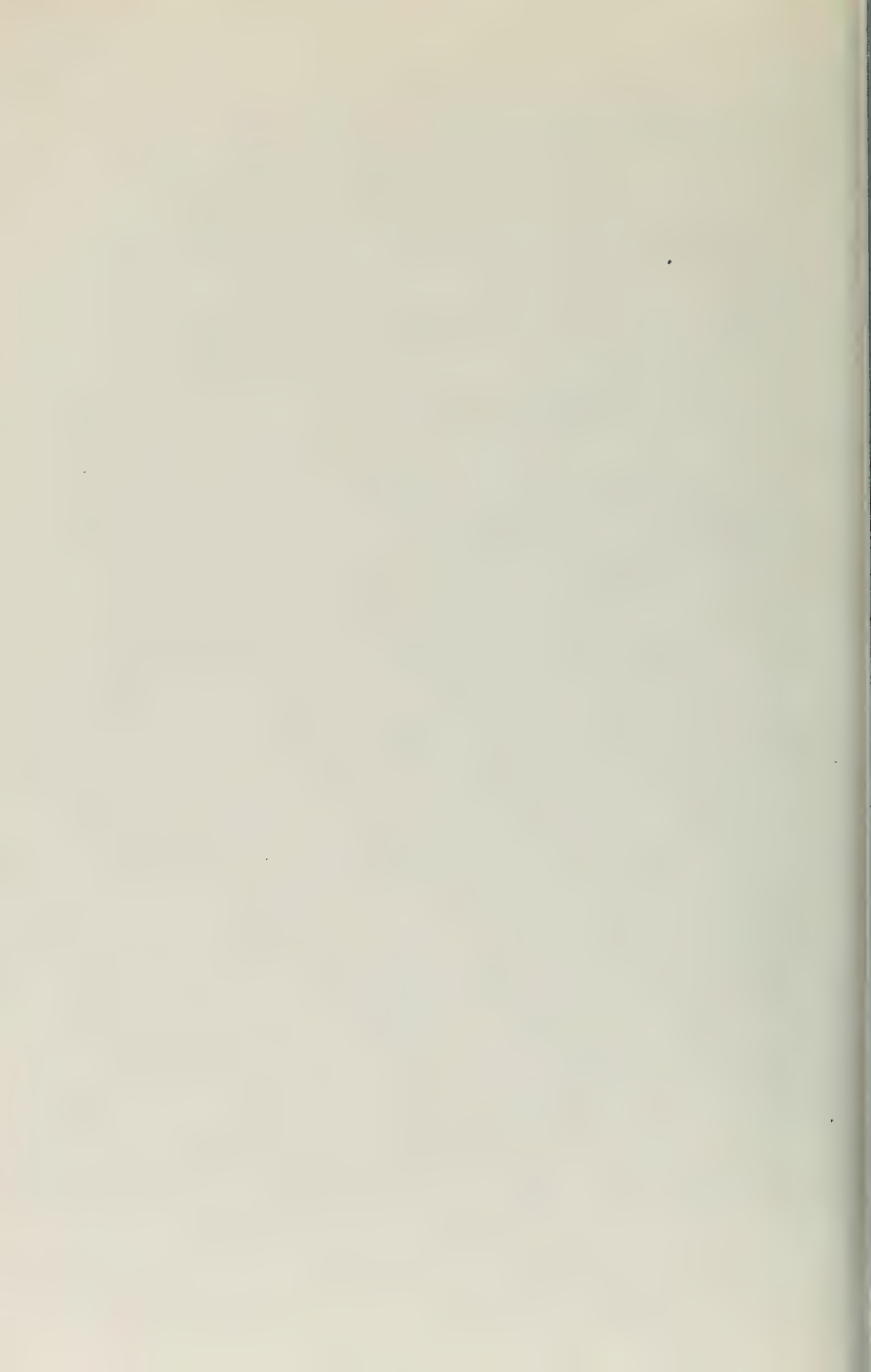
The authority for this action is found in Section 2409 of the Revised Codes of Montana of 1921, which provides as follows:

"Whenever any license fee is demanded of any person for the use and benefit of the state of Montana, and the same is deemed unlawful by the person from whom the same is demanded, such person may pay the same, or so much thereof as may be deemed unlawful, under protest to the state treasurer, who shall deposit the same in a special fund to be designated 'Protest License Fund'; and thereupon the person paying, or his legal representatives, may bring an action in a court of competent jurisdiction against the state treasurer to recover the same, without interest; provided, that any action instituted to recover any license paid under protest shall be commenced within sixty days after the date of payment thereof to the state treasurer."

Respectfully submitted,

GUNN, RASCH & HALL,

Attorneys for Plaintiff in Error.



No. 5857

United States
Circuit Court of Appeals 4
For the Ninth Circuit

THE CONTINENTAL OIL COMPANY, a Corpor-
ation,

Plaintiff in Error,

vs.

J. W. WALKER, as State Treasurer of the State of
Montana,

Defendant in Error.

Brief of Defendant in Error

WELLINGTON D. RANKIN,

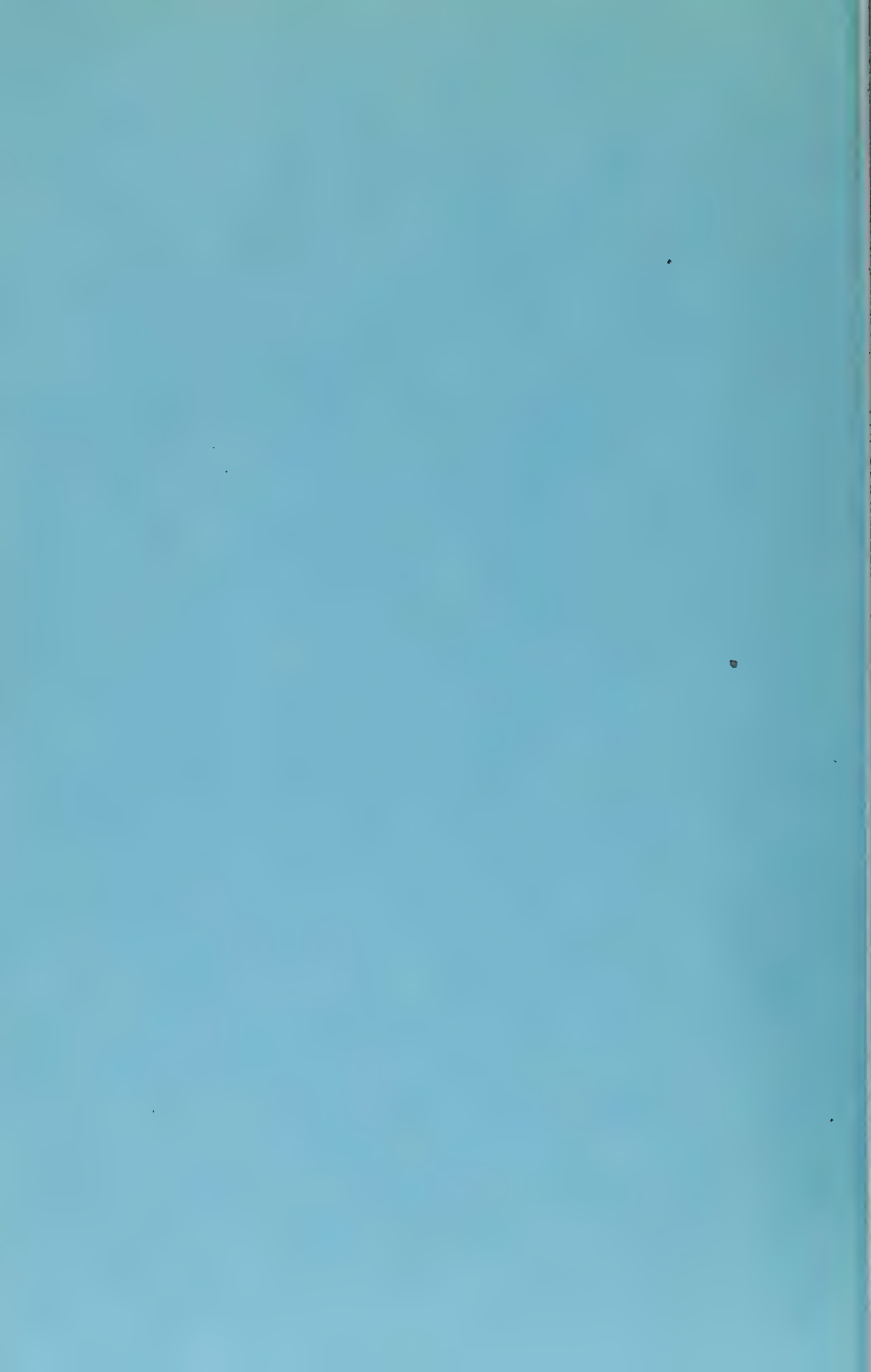
Attorney General,

Attorney for Defendant in Error.

FILED

OCT 11 1902

U. S. DISTRICT COURT



**United States
Circuit Court of Appeals
For the Ninth Circuit**

THE CONTINENTAL OIL COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. W. WALKER, as State Treasurer of the State of Montana,

Defendant in Error.

Brief of Defendant in Error

The Statement of the Case by the plaintiff in error is substantially correct.

ARGUMENT AND AUTHORITIES

I.

The tax imposed under Chapter 156, Laws 1921, Sections 2381 to 2396, Inclusive, Revised Codes of 1921, is a license or privilege tax.

State vs. Hammond Packing Co., 45 Mont. 343.

This case was affirmed by the United States Supreme Court.

See 233 U. S. 331; 58 L. Ed. 985;
Provident Institution vs. Mass., 6 Wall. 611;
Askren vs. Continental Oil Co., 252 U. S. 444,
448; 64 L. Ed. 654;
Home Ins. Co. vs. N. Y. 134 U. S. 594;
Soc. for Savings vs. Coit, 6 Wall. 594;
Northwestern Mutual Life Ins. Co. vs. Lewis
& Clark County, 28 Mont. 484; 72 Pac. 982;
Scottish, etc. Ins. Co. vs. Herriott, 80 N. W.
665;
Equitable Life Assurance Co. vs. Hart, 55
Mont. 76, 173 Pac. 1062.

II.

THE VALIDITY OF THE TAX IS NOT DETERMINED BY THE MODE OF LEVY.

In the case of *Maine vs. Grand Trunk*, 217 U. S. 236, 35 L. Ed. 994, 995, Mr. Chief Justice Fuller, speaking for the Court, said:

“As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule

of apportioning the charge to the receipts of the business would seem to be eminently reasonable and likely to produce the most satisfactory results, both to the State and the corporation taxed."

III.

THE ACT IS NOT RETROACTIVE.

The Act imposing the license tax merely requires the payment, at a given time subsequent to its enactment, of a sum measured by preceding sales for the privilege of engaging in the business named. The tax is imposed upon the privilege of engaging in business after the passage of the act, the value of the privilege being determined by reference to past sales.

Conn. Mutual Life Ins. Co. vs. Kellsey, 101 N.

Y. S. 902, affirmed in 80 N. E., page 1116;

Billings vs. U. S., 232 U. S. 261, 282; 58 L. Ed. 596;

Flint vs. Stone-Tracy Co., 220 U. S. 107; 55 L. Ed. 389;

Patton vs. Brady, 104 U. S. 608, 17 R. C. L. 501, et seq;

Gray's Limitation of Taxing Power, p. 53, Sec. 67, and p. 695, Sec. 1403 (a) et seq;

State vs. Bell, 61 N. C. 76.

In the case of Connecticut Mutual Life Ins. Co. vs. Kellsey, *supra*, the statute which was enacted in March provided for payment of the license tax in July of the same year, to be measured by the gross amount of premiums for the preceding calendar year. The Court, in holding it constitutional, used the following language:

"The statute clearly defines what tax it was which was imposed. The relator was found here

in this state exercising its corporate franchises and carrying on its business in its corporate and organized capacity, when it was required to make its report to the Comptroller and when the tax under this statute was made payable. It was therefore liable to pay the annual tax imposed under this statute for the privileges it enjoyed. Upon paying the tax so imposed the relator was exempt from any further tax under this section until the time when, pursuant to it, the next annual tax was made payable. The tax is in no sense a tax upon the relator's property or business 'during the year 1904,' but it was a tax for the exercising of such privileges, based, as the Legislature had a right to base it, upon its gross premiums received here during such year; that is, the prior calendar year. The tax is not a retroactive one, but was imposed upon the relator because it was here within this state exercising such privileges at the time it was required to report and at the time when the tax was payable.

"The amendatory act of 1905 (Chapter 94, p. 131) became a law March 23rd of that year; and it is urged that it could properly have no retroactive effect, and therefore that a tax for the privilege of doing business during the year 1904, or during that part of the year 1905 prior to the taking effect of the amendment, cannot be sustained for constitutional reasons. But the act of 1905 was not the first one imposing a franchise tax upon foreign insurance corporations, and prior to the amendment such corporations were taxable at the same rate as under the amendment on the gross amount of premiums received during the preceding calendar year for business done in this state. The tax not being one upon property, but being a franchise tax for privileges enjoyed, based upon the gross premiums received in the state for a certain defined period, and payable at a definite time once each year by all insurance corporations

exercising such privileges in the state, was clearly within the legislative power to impose. *People ex rel. U. S. A. P. P. Co. vs. Knight*, 174 N. Y. 475, 67 N. E. 65. The act imposing it, so construed, is not in any sense retroactive, and therefore the arguments aimed against its validity from a constitutional point of view have no force."

IV.

It is believed that the Act is not affected by Section 3 of the Revised Codes of 1921 which provides that: "No law contained in any of the Codes or other statutes of Montana is retroactive unless expressly so declared," for the reason that it operates prospectively to require on March 31, 1921, the payment of a license for a privilege whose value is ascertained by using as a measure the sales made between January 1, 1921, and March 31, 1921.

If Section 4 of Chapter 156 should be construed to be retroactive in its operation, it must be because this section specifically refers to the quarter preceding March 31, 1921, and it would necessarily follow that the Act expressly declares its retroactive application within the meaning of Section 3, Revised Codes of 1921.

In the case of *Billings vs. United States*, 232 U. S. 261, 282, the Court said:

"Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession does not cause the act to be beyond the power of Congress under the Constitution to adopt. *Flint vs. Stone-Tracy Company*, 220 U. S. 107 and authorities there

cited. While the rule is that statutes should be so construed as to prevent them from operating retroactive, that principle is one of construction and not of reconstruction and therefore does not authorize a judicial reenactment by interpretation of a statute to save it from producing a retroactive effect.

As under the meaning which we thus give the statute the admitted use of the vessel was within its provision and therefore the amount due for excise was rightfully imposed and under our interpretation was due when demanded, we must consider whether the asserted repugnancy of the statute to the Constitution is well founded.

It has been conclusively determined that the requirement of uniformity which the Constitution imposes upon Congress in the levy of excise taxes is not an intrinsic uniformity, but merely a geographical one. *Flint vs. Stone-Tracy Company*, 220 U. S. 107; *McCray vs. United States*, 195 U. S. 27; *Knowlton vs. Moore*, 178 U. S. 41. It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment. *McCray vs. United States*, 195 U. S. 27 and authorities there cited."

V.

The Act does not provide an unreasonable or unjust classification.

The validity of a tax cannot be questioned because it does not operate with absolute equality and justice upon all.

In the case of *Flint vs. Stone-Tracy Co.*, 220 U. S. 107, the Court said:

“It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations. Some corporations do a large business upon a small amount of capital; others with a small business may have a large capital. A tax upon the amount of business done might operate as unequally as a measure of excise as it is alleged the measure of income from all sources does. Nor can it be justly said that investments have no real relation to the business transacted by a corporation. The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business methods; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige.

“It is true that in the *Spreckles Case*, 192 U. S. *supra*, the excise tax, for the privilege of doing business, was based upon the business assets in use by the company, but this was because of the express terms of the statute which thus limited the measure of the excise. The statute now under consideration bears internal evidence that its draftsman had in mind language used in the opinion in the *Spreckles Case*, and the measure of taxation, the income from all sources was doubtless inserted to prevent the limitation of the measure-

ment of the tax to the income from business assets alone. There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business. Departures from that rule sustained in this court are not wanting."

It was held in the case of *Clark vs. Titusville*, 184 U. S. 329, that licenses graded in amount by incomes in excess of fixed sums and less than other fixed sums with a difference in amount of \$10,000 were not unconstitutional because one within a certain class might pay no more license than another though his income might be almost \$10,000 more.

See also *State vs. Winchell*, 86 So. 181, where it was held that a dealer in pistols doing a business just in excess of \$2500.00 was not discriminated against by reason of the fact that he was required to pay the same license as a dealer doing a business just under \$5,000.00.

VI.

The only contention made by appellant on this appeal is that the Legislature did not intend the license to be based upon sales made prior to its taking effect, but only on sales made subsequent to that date, the argument being that, as the Act requires a license only for engaging in business subsequent to March 5th, Section 3 should be construed as though it read:

"Every dealer shall, in that part of the year 1921, after March 5th, that he shall engage in business, pay a license tax equal to 1c for each

gallon of gasoline and distillate sold or distributed by him during such part of said year.”

The strongest argument against this contention is that, had the Legislature intended the Act to be so construed, it certainly would have made the slight change in this section suggested by counsel's statement, or used some other language equally plain, simple and incapable of any ambiguity. If we admit that the legislative intent was that Section 3 should read as suggested, it is possible that Section 6 could be construed to cover only that part of the quarter ending March 31st subsequent to March 5, 1921, but standing alone or read in connection with Section 3, its plain and obvious meaning is that every dealer must make out a statement within thirty days after the end of the quarter, showing the total number of gallons of gasoline and distillate sold by such dealer during the quarter. Nor does Section 5, which merely requires a record of all sales to be kept for the inspection of the Board of Equalization, aid in any way the construction contended for. This requirement is merely for the convenience of the agents and officers of the Board, and, while it could have no reference to sales made prior to taking effect of the Act, it is in no way inconsistent with other provisions requiring sales, made during that part of the first quarter prior to March 5, 1921, to be accounted for. However, as suggested in the opinion of the lower court:

“The Act says plainly enough that dealers ‘for the year 1921’ and thereafter shall pay the tax in respect to sales ‘during each year,’ in “quarterly installments,’ ‘beginning with the quarter ending

March 31, 1921, (for the 'year,' '1921,' and 'quarter ending March 31, 1921,' as generally in statutes import the calendar year and quarter and without apportionment for that part of the year and quarter that had expired before the act's approval. And this is retroactive intent 'expressly so declared,' within the meaning of Sec. ———, *supra*."

The case of *Dodge vs. Nevada National Bank*, 109 Fed. 726, cited in appellant's brief on the proposition that a statute should not be given a retroactive operation unless the language of the Act clearly gives it this effect, was a case where a statute, making National bank shares, assessable, became a law on March 14th. The constitution required a statement from each taxpayer of all real and personal property owned by him on 12:00 o'clock M, the first Monday in March. The question then was whether the act was effective for the year in which it became a law. The Court said:

"Conceding for the purpose of this discussion that the Legislature had the power to make this statute retroactive as is held in several of the cases cited by appellant, the fact is that it did not do so. There is no language used in the act evidencing any such intent."

In that case the tax was clearly upon the shares of stock, and not upon the privilege of doing business, and there was nothing in the Act indicating an intent to make the Act retroactive.

The case of *Schwab vs. Doyle*, Advance Opinions U. S. Supreme Court, June 1, 1921, cited by appellant, involved the construction of the Federal Inheritance Act of September ———, 1916, and whether it was retro-

active so as to cover transfers made long prior to that date and necessarily without any intent to avoid the provisions of the statute, we submit is not in point.

The cases of *Gulf C. & S. F. R. Co. vs. Ellis*, 165 U. S. 150; *Barber vs. Connolly*, 113 U. S. 27; *Connolly vs. Union Sewer Pipe Co.*, 84 U. S. 540 are not in point.

We submit that the Act in question violates no constitutional right of plaintiff in error and that it is clearly the intent of the act to take into account business transacted during that part of the first quarter of 1921, prior to the date of its taking effect; that it does not provide an unreasonable or unjust classification, and that the lower court did not err in sustaining the demurrer to the amended complaint.

Respectfully submitted,

WELLINGTON D. RANKIN,

Attorney General,

Attorney for Defendant in Error. *WDR*

